

TENANTS LAW:

OR, THE LAW S

CONCERNING

Landlords, Tenants *and* Farmers:

(VIZ.)

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| <ol style="list-style-type: none"> 1. Of the several Kinds of Tenants and Tenures. 2. Of Leases, Covenants, Surrenders, and assignments, &c. 3. Of rent: Acceptance and Extinguishment thereof. 4. Of crops growing, and Trees blown down, &c. who are entitled to them. 5. Of Distresses, Replevins, and Rescous. | <ol style="list-style-type: none"> 6. Of Waste; what is so, and what not. 7. Of Common for Cattle. 8. Of Frauds in buying and selling Lands or Goods. 9. Of Trespasses and Nuisances. 10. Modern Observations relating to Covenants on Leases. 11. Of Acts to prevent Fires; and Rules to be observed in erecting of new Buildings in and about London. |
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Useful for all Landlords, Tenants, Farmers, Stewards, Agents, Solicitors and others, concerned in the buying, selling, or letting Estates.

The SIXTEENTH EDITION, with all the Modern Cases:

In which are added all such Acts of Parliament and Resolutions, as relate to these Subjects, down to the present Year; and likewise plain Directions for distraining for Rent.

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T H E
L A W S
C O N C E R N I N G
Landlords and Tenants.

C H A P. I.

*A Division of the several Kinds of Tenants
and Tenures.*

EVERY subject of this kingdom that occupieth any lands, or inhabiteth in any house or tenement, is said to be a tenant, *tenens a tenendo* ; because he must hold of some lord or other.

And divers and various are the natures and kinds of tenants and tenures in this land at this time ; although they have been more numerous, and were indeed of excessive slavery to the people, so

B

that

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that their exorbitant cruelty hath caused their dissolution.

Those which are ceased to be, are tenure in *villenage*, where the lord might vassal and enslave his tenant's person at his pleasure, but not kill him.

Pillenage, where the lord might pillage his tenant of all his goods.

Frank-Almoigne, or free arms, was a tenure begun, and had its original, either at or soon after the foundation of *monasteries* and religious houses, and extirpated with them. The nature of it in old time was, when a man being seised of lands or tenements in his *demesne* as of fee, of the same land did enfeoff some abbot or prior, and their convents, or some dean and chapter, and their successors, or some parson of a church, and his successors, or any other religious person who was in a capacity to take such alms, to hold the same lands and tenements to them and their successors, in *liberam eleemosynam*, in free alms or *Frank-almoigne*, of the grantor and his heirs: And such as held in free alms were bound, in consideration of such grant or feoffment, to perform certain divine and religious services and exercises, for the soul's good, life and prosperity of the grantors, and all others.

And they confirmed all their grants with grievous *anathemas* and imprecations against all such, as should in any ways diminish or take away such their grant, or convert the same unto any other use; which some sillily and superstitiously believe to be none of the least causes, why purchasers of church lands find such ill success, and seldom do enjoy it to the fourth generation.

But

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But as is said before, this tenure and the religious houses ended together, or immediately one after the other, so that none can grant any lands or tenements *in liberam eleemosynam* at this day.

Tenure *in capite* and *Knight's Service* was also by act of parliament *Anno 12 Car. 2. cap. 24.* (together with the court of wards, which was dependant upon that service) taken away, and all those tenures are now turned into free and common *socage*.

Also tenure by *Grand Serjeanty* was a kind of tenure by knights service, and so was tenure by *escuage*, because the king had the wardship and marriage of such tenants under age; and though these tenures are taken away by the said *Stat. 12 Car. 2.* yet the honorary services of grand serjeanty still continue.

But it is said, that tenure by *petit serjeanty* is no more than a *socage* tenure in effect, because the tenant is not thereby bound to do any thing in his proper person touching the wars, and had not wardship, marriage or relief annexed; yet this seems to be also taken away by the said statute.

So that the more usual tenants among us at this day, are,

Tenants in *Fee-Simple*, and in *Fee-Tail*.

Tenant *in tail* after possibility of issue extinct:

Tenant *in dower*, and by the *curtesy* of *England*; tenant for term of life, or for years, upon lease in writing, or lease-parol.

Tenant *at will* by the common law, or by custom.

Tenant *at sufferance*.

Tenant by *Copy of Court-Roll*.

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Tenants in Coparcenary, Joint-Tenants and Tenants in common.

Fee-Simple

A man that is seised in lands or tenements, to hold to him and his heirs for ever, is said to be tenant in fee-simple; and such an estate is called *Feodum Simplex*. The word *Feodum* in *Latin*, being taken to signify inheritance; and *simplex* implies pure, plain or unmixed: And indeed fee-simple is the most pure holding; that is, being unmixed or intangled in itself. But as the whitest colour will be soon stained, so is this pure tenure most subject to be spotted and involved in troubles above any other; which the law calls *incumbrances*. Lit. Ten. Lib. 1. cap. 1.

If a man was to deal as purchaser with a tenant in fee-simple, he hath a happy bargain if he meets with a simple tenure and a simple tenant; I mean the one free from incumbrances, and the other from deceit; which many have found it a difficult thing to obtain.

I shall therefore, by way of caution, set down the several troubles and incumbrances this pure tenure, called *Fee-Simple*, is subject unto.

Fee-Simple may be incumbered with several judgments, statutes-merchant, and of the Staple, recognizances, mortgages, wills, pre-contracts, bargains and sales, feoffments, fines, amerciaments, jointures, dowers, and many other fraudulent conveyances, if a knave once possess it; and last of all, may be quite forfeited for treason, or felony that incurs forfeitures.

But

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But fee-simple being free from any of the above-mentioned incumbrances, is the most free, absolute and ample estate of inheritance that any man can have; and therefore a tenant in fee-simple is said to be *seisitus in dominico suo ut de feodo*; that is, seised in his demesne as of fee.

Tenant in Fee-Tail.

All freehold inheritances, before the statute of *Westminster 2. cap. 1. De Donis conditionalibus*, were fee-simple at the common law; but there were fee-simples conditional; so that tenant in tail was instituted by force of that statute; by which statute there is a two-fold tenant in tail, *viz.*

General and Special Tail.

He is said to be tenant in general tail, who holdeth lands or tenements to him and to the heirs of his body begotten.

For if in this case he marry many wives, and have issue by them all, every one of them may (the elder dying) come to inherit this land, because every one is the issue ingendered of his body.

It is the same case if lands or tenements be invested upon a woman and the heirs of her body, and she have several husbands, and children by them all, every one of them is in a possibility to inherit those tenements, being all begotten of her body.

But where lands or tenements are settled upon a man and his wife, and the heirs of their bodies between them two lawfully to be begotten, this is

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But where lands or tenements are settled upon a man and his wife, and the heirs of their bodies between them two lawfully to be begotten, this is

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tenant in special tail; because in this case none can inherit but such children as are by this man begotten upon the body of this wife named in the grant: And that if the wife die and the man taketh another wife, and hath issue of her body, the issue by the latter wife cannot inherit by virtue of such a grant. And if the first husband die, and the wife marry again, and have issue by a second husband, that issue cannot inherit. *Lit. Ten. l. 1. c. 2. f. 5. a.*

There be several other estates in special tail, according to the devises, limitations and conditions, invented and settled by the *donor*; as sometimes to a man and his wife, and the heirs males of their bodies between them two to be begotten: In this case the females cannot inherit. *Et e contra*: For if limited to heirs females of their bodies, then the males cannot inherit.

So that if lands be invested upon a man and his heirs males of his body, and he hath issue two sons, and dieth, the eldest enters according to the grant, and hath issue a daughter, and dieth, this daughter shall not inherit the land, but the brother, because he is the heir male.

And if a man hath lands granted to him, and to his heirs males of his body, and he hath no son, but only a daughter, and the daughter hath a son, and dieth, living her father, and after that the *donee* dieth; in this case the *donee* dying without issue male in the law, the son of his daughter, which is the grand-child, shall not inherit, but the entail is extinct, and the land shall revert to the *donor* for the entail must be carried on intirely by the male line.

These grants in tail are the cause of much strife, and stir up many chargeable suits, though in my judgment

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judgment they are useless. For the intent of the *donor* is seldom observed in them, he intending to preserve the memory of his own name to perpetuity; which cannot be, since a fine and recovery will now bar and *dock* it.

For the said statute *De Donis, &c.* being made 13 *Ed.* 1. established a general perpetuity in estates descendible for all that would make it; so that most estates were consequently entailed *in perpetuum* by the *donor*, on the heirs of the *donee*; which being against the policy and reason of the common law, became the occasion of many mischiefs; for lords were often thereby defeated of their escheats, and other duties and services, and purchasers and tenants often lost their estates, and were evicted by the heirs of the grantors and lessors; for the ancestor could not bind his estate farther than for his own life.

These mischiefs were often attempted to be redressed in divers parliaments, and divers bills to that end were exhibited, which were always rejected on one pretence or other; but the true reason was, the lords and commons knowing that their estates-tail were not forfeitable for felony or treason (as estates in fee-simple were,) and finding they were not liable to the debts, incumbrances, sales, alienations or leases of their ancestors, did always reject such bills.

This continued until about the 12th of *Ed.* 4. when the judges, upon consultation among themselves, did agree and resolve, that an estate tail might be docked and barred by a common recovery, and that by reason of the intended recompence in value a common recovery was not

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within the restraint made by the said statute *de donis conditionalibus*.

If tenant in tail general or special die without issue, the *Donor* or his heirs shall enter as in their reversion; for in every gift in the tail, without more saying, the reversion of the fee-simple is in the *donor*. *Lit. Ten. l. 1. c. 2. f. 3.*

Tenant in Tail after Possibility of Issue extinct.

When lands and tenements be granted to a man and his wife in special tail, and one of them die before they have issue, the survivor is tenant in tail, after possibility of issue extinct; but if they have issue, during the life of the issue, the *survivor* cannot be said to be tenant in tail after possibility of issue extinct: But if the issue die without issue, and leave none to inherit by virtue of the entail, then the surviving *donee* is tenant in tail after possibility of issue extinct. *Lit. Ten. l. 1. c. 3. f. 7.*

And none can be tenant in tail after possibility of issue extinct but one of the *donees* in special tail; which tenant in tail, after possibility of issue extinct, is not chargeable for committing of waste, because the inheritance was once in him; but if he doth alien in fee, it is a forfeiture of his estate, and the heir in reversion may enter. For several other privileges and qualifications of this tenant, *vide Co. Lit. f. 27. b. Fitz. Waste 125. Kitch. f. 228.*

Tenant

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Tenant by the Curtesy of England.

When a man marries a wife seised in Fee-simple, or in general Fee-tail, or one that is heiress unto lands or tenements in special, and hath a child by the same wife, male or female, born alive, and the wife die; whether the child be living or dead, the husband shall hold the same lands during his life, as tenant by the curtesy of *England*, which is a tenure used in none other country but *England*: And although the child die as soon as it is born, if it were but heard cry, the husband shall hold the lands after his wife's decease, during his life, as tenant by the curtesy; the crying of the child being a sufficient testimony of its being born alive. *Lit. l. 1. c. 4. f. 8.* Though the child is not heard to cry, if there is sufficient proof of its being alive, it is sufficient.

Tenant in Dower.

This kind of tenant is alway of the feminine gender; and is, when a man who is seised of lands or tenements in Fee-simple, or in general tail, or is heir in special tail, marries a wife, and dies, the wife after the death of her husband, shall have during her life the third part of such lands or tenements as her husband had during the coverture, whether she had any issue by him or not, so she be above nine years of age at her husband's death. *Lit. l. 1. c. 2. f. 5.* This is dower at the common law, but by custom in many places it is otherwise; for in some places she shall have the half, and in others the whole; and in all these cases she is tenant in dower.

In *Kent* it is the custom for the woman to have half her husband's lands *durante viduitate*, so long as she continues a widow, and without child; but if she marry again, she loses all: So likewise is the custom there, if a man marry a wife, having an estate in lands, &c. and she die without issue, he shall have half while he remains sole; but if he marry again he loseth all. And in *Kent* they say, the reason thereof is, because they do not love that their lands should help to maintain any children, but such as are of their own getting; but how sure they are thereof *ignoramus*.

That by the custom of some towns or boroughs, she have the whole. See more of this, *Co. Lit.* 31, 33. That there needs no livery and seisin to an assignment of dower. *Co. Lit.* 35. And that it must be of some part of the land, or of a rent issuing out of the same. *Ibid.* & *Dyer* 91. See more in *Lit. on Ten.* l. 1. c. 6. f. 11. and *Co. Lit.* on the chapter of dower.

One devised a sum of money to his wife, on condition she would renounce her dower; she accepted of the legacy, and yet the chancery decreed that she was not barred of her dower thereby. It was further held, that she being an orphan, and her portion remaining still in the chamber of *London*, it should be considered as a debt due to her before marriage, and remain to her; and that the executors of the husband were not intitled to it. *Pheasant versus Pheasant*, in *Canc. Trin.* 22 *Car.* 2. *Cases in Chancery*, 1st part, p. 181.

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Tenant for life.

He that holdeth lands or tenements for the term of his own life, or for the term of the life of any other person: In this case, the lessee, either for the term of his own life, or for another's, is tenant for term of life: And this tenant for life hath in him the freehold, this being the lowest degree of freehold. *Lit. Ten. l. 1. c. 6.*

If a man be tenant for term of his own life, he hath a higher estate than he that is tenant for the life of another. *Co. Lit. 42. a.*

Note; A lease for life must be executed with livery because an estate for life is a freehold. *See after.*

In a grant for term of life, it is said to be from lessor to lessee. *Note*; There is *Feoffor* and *Feoffee*, *Donor* and *Donee*, *Lessor* and *Lessee*; there is likewise *Grantor* and *Grantee*, *Obligor* and *Obligee*, *Mortgager* and *Mortgagee*.

He that enfeoffeth another in lands or tenements, is called the *Feoffor*; he to whom the feoffment is made, is the *Feoffee*.

So when a man giveth lands or tenements to another in tail, he is called the *Donor*; and he to whom the gift is made, is the *Donee*.

And likewise he that letteth to another any lands or tenements to hold for term of life, for years, or at will, is called the *Lessor*; and he to whom the lease is made, is called *Lessee*: Which lessee for life (as I said before) is tenant of freehold. So also he that pawneth land to another, is called *Mortgager*; and he to whom it is pawned, is called the *Mortgagee*.

Tenant for life is punishable for waste, and may commit a forfeiture.

By *Stat. 4 & 5 Annæ*, all warranties made by tenant for life of any lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, are void.

Tenant for Years.

Tenant for term of years, is when a man demiseth, and letteth any lands or tenements to another to hold for a certain number of years agreed upon between the lessor and the lessee; by force and virtue of which lease the lessee entereth into the said tenements.

This lease for term of years may be granted by word of mouth, and this is called a *Lease Parol*; which formerly bound the lessor so long as the term was accorded for, if the witnesses lived to prove the lease parol.

But now the more safe and usual way is to take a lease by deed indented, which needs no other execution but only sealing and delivery. For by virtue of that lease, the tenant may enter whenever he will.

By the statute for prevention of frauds and perjuries, viz. 29 Car. 2. c. 3. *Leases parol, or by word of mouth only, will be void, if they exceed three years from the making; and full two third parts at least of the improved value of the thing demised, must be reserved to the landlord.* See after, Chap. II. and Chap. VIII.

And no leases, estates or interests, either of freehold or terms for years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of
any

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any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law. Same statute.

And no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party, or some other party by him lawfully authorized. Same statute. See Chap. VIII. p. for observations on this statute.

Every one seised of an absolute estate in Fee, simple in his own right may make a lease for as many years as he pleaseth, provided it be not a body politick, who are limited to a certain time, which, if they exceed, it is either void, or a devise in mortmain; and in this case the chief lord may enter for the forfeiture, unless they have purchased licence from the king and the said chief lord. See 29 H. 8. Mortm. 39. Stat. 23 H. 8. 10, &c. Fitz. 221. F. 222. D. 223. E.

But now by the Stat. 7 & 8 W. 3. c. 37. made for the encouragement of charitable gifts and dispositions, the king alone, his heirs and successors, may grant to any person or persons, bodies politick or corporate, their heirs and successors, licence to alien in Mortmain, (a)

(a) Mortmain; where lands are given to a house of religion, or to other company incorporated by the king's grant, the land is come into Mortmain, i. e. a dead hand. Terms of the law, p. 466.

and

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and also to purchase, acquire, take and hold in Mortmain, in perpetuity or otherwise, any lands, tenements, rents or hereditaments whatsoever, of whomsoever the same shall be holden.

And such lands, tenements, &c. so aliened or acquired and licensed, shall not be subject to any forfeiture, by reason of such alienation or acquisition. Same statute.

A lease for term of life must be executed by *Livery* and *Seisin*, (a) because the freehold passeth with that lease, which it cannot do without *Livery* and *Seisin*.

This was the case of *Allen* and *Waller* at the *Lent* assizes at *Maidstone* 1654. *Waller* brought an *Ejectione Firmæ* against *Allen*; the defendant proved a lease parol at a certain rent during his life: Which last word of the defendant's witness gave the verdict against him, because none can be tenant for life without *Livery* and *Seisin*.

(a) *Livery* of *seisin* is a delivery of possession of lands, tenements, or other *corporate* things, unto one that hath a right thereunto; being a ceremony used in the conveyance of lands or tenements, &c. where an estate of fee-simple, fee tail or of freehold in houses and lands passeth; but not in grants of *rents*, *advowsons*, &c. or any thing which lies in grant. — *Livery* of *seisin*, is a testimonial of the willing departing of him who makes the *livery* from the things whereof *livery* is made; and the receiving of the *livery* is a willing acceptance, by the other party, of all that whereof the other hath divested himself. For the manner of delivery of *seisin*, vide 2 *Lilly's Pract. Reg.* 223.

Also

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Also if a man make a lease to one for years, the remainder to another for life, or in tail, or in fee, here the lessor ought to make *Livery* and *Seisin* to the lessee for years, or else nothing shall pass to him in remainder, though the lessee enter and enjoy his term of years; but the freehold and the reversion remains in the lessor. But if the lessor make *Livery* and *Seisin* to the lessee, then the freehold passes over to them in the reversion, according to the grant. For the manner of *Livery* and *Seisin*, see *Pract. Reg.* last published, 397.

That *Livery* must pass a present freehold, and cannot commence *in futuro*. See *Hob.* 171. For the *Livery* must have some estate immediately to operate on.

How a corporation may make *Livery* of *Seisin*: A corporation cannot make *Livery* and *Seisin* to pass away the freehold lands belonging to corporation, but they may make a letter of attorney to another, under their common seal, to make *Livery* and *Seisin* for the corporation; for *Livery* and *Seisin* must be made by *one act*, and not by a *multitude*; and a corporation can do no *acts* but under their common seal.

If a tenant for years of lands consent, that *Livery* and *Seisin* shall be made unto him that hath purchased the reversion of those lands let unto him, and it be made accordingly, this is a good *Livery* and *Seisin* to make the reversion pass, although the tenant for years do not go off from the land at the time when the *Livery* and *Seisin* was made. *Ibid.* See after.

Likewise if a man make a lease of lands or tenements to another for term of years, and the lessor die before the lessee enter into the tenements; nevertheless

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nevertheless he may enter, notwithstanding the death of the lessor, because the lessee hath right to the tenements by virtue of his lease, immediately after the sealing and delivery of it. *Vide* Chap. II. p. For he has the *interesse termini*, and has a right to enter when he pleases, for his right has its existence from the lease.

Tenant at Will.

Tenant at will is where a man demises lands to another to hold to the lessee at the will of the lessor, *vel e contra*, and by virtue of this lease the lessee is in possession; here the lessee is tenant at will, and hath no certain estate in the tenements he holdeth, but the lessor may eject him when he pleases: neither can the lessor force him to stay longer than he pleases. *Co. Lit.* 55. a. In all cases of tenancy at will, the will is reciprocal, *i. e.* it is determinable at the election of either party.

But if the tenant at will sow the land, and the lessor eject him out afterwards before the corn be ripe, the lessee shall nevertheless have his crop, and shall have free egress and regress to cut and carry it away, because he knew not when the lessor would enter upon him; but he must cut and carry it off in convenient time, for else it will be liable to distress, or in some cases to execution.

It is said, that if one be in possession of the lands of another, and hath usually paid a rent unto him for these lands, although it cannot be expressly proved that the lands were demised at will to him that is thus in possession of the lands, *viz.* That he should hold them as long as both parties

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parties should please; yet if the payment of a quarter or half a year's rent can be proved, this will be a good evidence of a lease at will. *Pract. Reg.* (the fourth edition) 403.

Words spoken off from the land by the *lessor* will not determine the will, until the lessee hath notice thereof: But an actual entry in the absence of the lessee will determine it; and the *lessor* may come upon the land, and forbid the *lessee* to hold any longer; or he may enter thereupon, in the presence of witnesses, and say, *I do hereby enter and take possession of this my land, &c.* and so oust the tenant at will. 1 *Inst.* 56, 57.

If a tenant for years sow his land so near the end of his term, that his lease expire before the corn be ripe, he shall not come to reap it; but the lessor or other who hath the reversion, shall have the crop, because the lessee knew certainly the end and determination of his term and lease, and it was his own folly to sow the ground under such circumstances.

In like manner if a house be let to a man to hold at will, and the lessee enters the house, and bringeth in thither his goods and household-stuff, and afterwards the lessor ejects him out; here he shall have liberty of egress and regress to fetch away his household-stuff, utensils, &c. and if such tenant die, the like liberty is given to his executors, &c. *Lit. Ten.* p. 15.

By *Holt* chief justice, Tenant at will rendering rent quarterly, the lessor may determine his will when he pleases; but then he will lose all his rent which will be due for the quarter in which he determines his will. So the lessee at will may determine his will when he pleases, but then he shall

shall pay the rent for all the quarter in which he determines the will. But if *A.* makes a lease to *B.* for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, *A.* may determine his will at the end of any year; but if any new year be begun, it cannot be determined before the end of the year. 1 *Lord Raym.* 707, 708. 2 *Salk.* 413. 3 *Salk.* 222. 2 *Lord Raym.* 1008. *Leighton v Theed.*

Tenant at will *de anno in annum quamdiu ambabus partibus placuerit*, after the commencement of the year, cannot determine his will to the prejudice of the lessor for his rent. *Jones* 5. 2 *Keb.* 260. *pl.* 10.

If tenant at will, rendering rent quarterly, begins a *new* quarter, and voluntarily determines the will before the quarter ended, yet he shall pay the rent for that quarter. *Aleyn* 4.

If one seised in fee-simple, fee-tail, or for term of life, in an house, and hath goods in that house, and makes his will, appointing his executors, and dies; now to whomsoever the house descends, the executors shall have liberty, in some reasonable time, to enter and carry away the goods.

And if a man by deed of feoffment grants certain lands to another, and delivers him the deed, but executes it not by *livery* and *seisin*, the feoffee in this case may enter on that land, and hold it at the will of the *feoffor*; but the *feoffor* may eject him out again when he will.

If a man dwell in a house as tenant at will, he is not bound to repair the said house, as a tenant for term of years is bound to do.

But if a tenant at will shall commit *voluntary waste*, as to pull down houses, cut, grub, fell or destroy

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destroy trees, the lessor may bring his action of trespass against him for so doing; and though a tenant at will is punishable for *permissive waste*, yet he shall answer for voluntary waste; for his committing waste is in the implication of law a determination of the will; and as in the case of a licence to hunt in my grounds, if the person to whom it is given cuts down trees, &c. his entry is looked on as a trespass *ab initio*. *Vide post*, Chap. VI. Also the lessor upon a lease at will, if he hath reserved a yearly rent, may either distrain, or bring an action of debt for the arrears, which he pleases.

Tenant at will made a lease from year to year; it is no disseisin, but it is a void lease, 4 *Leon. Ca.* 95.

It doth not seem improper to observe in this place, that it is held by opinions of the first authority, that there is no such tenure, as tenancy at will existing at this day; for it is said that the nature of the tenure depends entirely upon the agreement of the parties, as to the payment of rent; for instance, if payable quarterly it is a tenure for a quarter of a year, and cannot be determined by either party without a quarter's notice, and so for any other time agreed on.

These opinions have carried this matter much further, for it was lately determined, that where *A.* leased a *messuage* to *B.* for years, and *B.* let *C.* into possession not only without the privity or consent of *A.* but *expressly* against it, and *B.* left the premises, upon *A.*'s bringing an ejectment against *C.* that *A.* could not recover possession for want of notice to quit being given by *A.* to *C.* though *A.* by such notice would have given *C.* a colourable title to his tortious entry, which *A.* avoided to do, as not looking

looking upon C. as his tenant, or himself as his landlord, between whom only notice of quitting is necessary; otherwise a landlord cannot possibly eject a person in possession of his premises, though he comes in without any sort of right.

However, notwithstanding the above modern doctrine on the subject, the reader may be assured, that whenever this matter comes under the judicial cognizance of the supreme judicature of the kingdom; it will be determined by the old common law, and not by modern *opinions* or *precedents*.

These opinions put me in mind of what the learned doctor *Blackstone* hath said on a similar occasion, which I beg leave to transcribe, being extremely applicable to our purpose; his words are.

“The common law of *England* hath fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new dress and refine, with all the rage of modern improvement.”

Indeed I do not know by what authority a judge can say, that there is no such tenant as a tenant at will, any more than he can say, that no toll can be gathered by law; for the one exists as much by the common law, as the other does by statute law.

Tenant at Sufferance.

Tenant at sufferance is he who comes in by lawful lease, and keepeth possession after his lease is expired, and wrongfully holdeth over: As tenant for life of J. S. who holdeth over after the death of J. S. *Co. Lit. f. 57. b. Kitch. f. 238.*

Every

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Every tenant at *sufferance* is made by the laches of his lessor. 2 *Leon.* 143.

The lessor cannot have an action of trespass against a tenant at *sufferance* before his own entry into the premises. *Co. Lit.* 57. b. 5 *Mod.* 384.

Also if one leases at will and dies, and the lessee continues in possession, though the lease be determined by the death of the lessor, yet the lessee is tenant at *sufferance*. *Co. Lit.* 57. b.

But if the king's lessee for years or life holds over his term, yet he is not tenant at *sufferance*, but an intruder; for no laches of entry may be imputed to the king. *Ibid.*

And if a guardian, after full age of the heir, continues in possession, yet he is not tenant at *sufferance*, but an abator, for his estate is created by act in law. *Ib.* And as the law gives him that estate, it facilitates the heir's remedy for his wrong.

If the husband leases for years the lands of his wife, rendering rent, and then the wife dies, the husband shall not have debt for the rent incurred after, for his estate is gone; and it seems the lessee is become tenant at *sufferance*. 1 *Roll. Abr.* 591. B. 4.

If one covenants to permit and suffer another to have, hold and occupy certain lands, *à die datus*, for life; this but a covenant, and no lease, and so the law expects no livery thereupon; and therefore he shall not be tenant at will, but only by *sufferance*. 1 *Roll. Abr.* 859. T. 10.

Also if *A.* bargains and sells lands to *B.* by way of mortgage, on condition to pay several sums yearly for certain years; and there is a covenant in the deed, that *B.* shall not take any profits

profits of the land, till default in some of the payments; this a new lease at will; for it is not that *A.* shall take the profits, but only that *B.* shall not take them, which sounds in covenant, and so *B.* is tenant at sufferance only, and not tenant at will. *Ibid.* 12.

See what is said at the end of “*Tenant at Will.*”

Tenant by Copy of Court-Roll.

This is a very antient tenure, and depends only upon custom; and there are so many and various kinds of customs in copyholds in several manors and countries, that it would take up a large volume to discourse of them all, which is not now our present intention; but we shall refer that subject to a farther opportunity, and here shortly in general terms set forth the nature of a tenant by copy of court-roll. In a manor wherein there is a custom, and hath been so used time out of mind, (for nothing can be a custom, unless it be *tempore cujus non extat memoria*, time out of mind) that certain tenants within the said manor have used to have lands or tenements, to hold to them and their heirs in fee-simple or fee-tail, or for term of life, or upon any other condition, at the will of the lord after the custom of the same manor, such tenants are called *copyholders*; that is, tenants by *copy* of court-roll (not tenants by court-roll): For a copy of the court-roll is all the evidence they have for their estates in the said lands. *Lit. Ten.* l. 1. c. 9.

Now a tenant by copy of court-roll may not alien his estate by deed; for if he do, it is a for-

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feiture to the lord, and the lord may enter and take the forfeiture. *Ibid. & Co. Lit. 59. a.*

But if any tenant by copy of court-roll will alien his lands, he may do it by a surrender into the hands of the lord, to the use of him that shall have it; and any kind of estate that a freeholder can make of his land by deed, a *copyholder* may do the same by surrender, if the custom will support it. *Lit. & Co. Lit. ut supra.*

The tenant by copy of court-roll is also bound by the custom to repair his houses; and if he suffer any tenement or house to fall down for want of repair, or if he pull it down, he forfeits his copyhold to the lord of the manor.

The tenant is as well inheritable as he that hath frank-tenement by the common law, if he observe the custom of the manor, and perform and pay his services. *4 Co. Rep. 21, 22, &c.*

There are seven properties incident for maintenance of a good custom.

First, it must be reasonable.

Secondly, It must be certain.

Thirdly, It must be according to common right.

Fourthly, it must be on good consideration.

Fifthly, it must be compulsory.

Sixthly, it must be without prejudice to the king.

Seventhly, it must be to his profit that claimeth the same.

In

In Customs, there is User, Non-User, Abuser and Interuser.

User, Is when, according to time and occasion, a custom is used.

Non-User, Is when, for want of time and occasion, or through negligence or forgetfulness, a custom is not used.

Abuser, Is when a custom is ill used ; for as user doth nourish a custom, so doth abuser destroy a custom.

Interuser, Is in some cases, where a custom may be used in one sort, and sometimes in another, and yet a good custom, if there be good considerations for the exchanging thereof at times.

If the lord have used, at the admission of his copyhold tenants, sometimes to take for a fine two pence, or sometimes four pence for an acre, sometimes twelve pence an acre ; this user is so uncertain, that it makes the fine arbitrary at the lord's will.

Custom to pay a fine according to yearly value, good. *Pract. Reg.* 174.

If the lord of the manor have used, time out of mind, to admit his copyhold tenants without fine, this usage shall bind the lord as well as a fine certain.

If the lord have used to have certain work-days of his tenants, and that hath not been used by the space of twenty years last past, yet this *non-user* is no discharge to the tenants, so that there be any alive that can remember the same.

If the tenants have used, when they sow their lands, to pay the lord rent-corn, and when it
lieth

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lieth in pasture, to pay their rents in money, this is a good *Interuser*.

If the tenants have used to pay their lord every fourth year a double rent, and every sixth year an half rent, this is a good *interuser*.

If the tenants have used to have common of pasture in their lord's woods for their horse-cattle, and they put in their neat-cattle, and destroy the woods, this is an abuser: But it is but finable, and no forfeiture of the common, no more than if they have a common for a certain number of beasts in the lord's soil, and they exceed the number; this abuse by the surcharging is only finable, and no forfeiture.

If a man have a fair to be used two days, and he keeps it three days, this abuse is a forfeiture.

Every good custom is grounded upon good reason, and that shall be said in reason a good custom, that in reason is a good law; for law and custom be of that affinity, as both do allow like reason, and both do forbid like inconveniencies; and the final effect of both is, to discuss and to discern every man's true right, and to give to every man that which is his own; for although custom in some cases differs from law, and doth admit execution of some acts without some ceremonies required by the law, yet the end and effect of custom is to maintain the like reason, and avoid the like inconveniences, as the law doth.

If the tenants of the manor will prescribe to hold without paying any rents or services for their copyholds, this is no good custom: But to prescribe to hold by fealty for all manner of services is good and reasonable, for there can be no tenure without some kind of service.

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If a lord will prescribe never to hold a court but when it pleaseth himself, this is not good, because it plainly tends to a defect of justice: But to prescribe never to hold a court for the special good of any one tenant, except the same tenant will pay him a fine for the same, that is good and reasonable; for general courts are held for the general good of the district within the bounds of the manor; and if every particular tenant had a right to demand a particular court it would be endless, and chargeable to the lord.

If a copyholder surrender his land to the use of a stranger, in consideration that the same stranger shall marry his daughter before such a day, if the marriage succeeds not, the stranger takes no benefit by the surrender. But if the surrender be in consideration that the surrenderee shall pay *such a sum* of money at such a day, though the money be not paid, yet the surrender standeth good; because in the last case the surrenderor has clearly a remedy for the money, and in the former he may not be able to compel the stranger to marry his daughter. Many customs there are, which at the beginning were voluntary, and now, by continuance, are grown compulsory: *Quæ initio fuerunt voluntatis, ex post facto fuerunt necessitatis*, saith the civil law; which also in many cases doth agree with the common law.

Wilful denying of services is a forfeiture. *Lit. Rep.* 295.

And if a copyholder convert part of his land into a fishery, it is a forfeiture. *Lit. Rep.* 268.

But if tenant for life of a copyhold suffers a recovery as tenant in fee-simple, this is no forfeiture. *1 Mod. Rep.* 199. If a fold-course is not

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due of common right, but of custom, and there is disturbance for it, it is no forfeiture. *Lit. Rep.* 267.

And of all forfeitures committed by copyholders, the lord only is to take advantage.

Also if he in remainder entereth upon a tenant for life of a copyhold, and maketh a surrender, nothing passeth. *Mod. Rep.* 199.

Note; An admittance of tenant for years is an admittance of him in remainder. *1 Vent.* 269. *Mod. Rep.* 102, 120. *4 Co.* 23. *3 Cro.* 504.

Custom for copyholders to have sole feeding in a certain waste; it is not needful to alledge that the beasts were levant and couchant. *Vide 2 Lev.* 2, 67. Where also it is said, copyholders may license others, (without deed) to put in their beasts, and may exclude their lord. *1 Vent.* 165. *2 Saund.* 326, 327. But if a man claim only common appurtenant, or part of the herbage, he must not say for his cattle levant and couchant; and *fol.* 338. says, the licence ought to be by deed.

Lands do not appear to be copyhold, by saying, they were held according to custom, unless it be said at the will of the lord. *Idem* 144.

In what cases, and when the lord shall seise the copyhold estate of his tenant for felony or treason. See *2 Vent.* 38. *1 Lev.* 263.

A remainder limited to one for the life of a tenant for life, may be good by way of remainder, because a tenant for life may forfeit by alienating in fee, and then he in remainder may enter and enjoy; but this reason holds not in copyholds; for if a tenant for life of a copyhold commits a forfeiture of his estate, the lord of the manor shall

take advantage of the forfeiture, and not he that had the remainder or reversion. 1 *Saund.* 151.

Also a lord may grant copyhold forfeited before seisure. 1 *Lev.* 26. But *Strode* vers. *Dennison*, 3 *Lev.* 94. Copyholder for life was attainted of felony, and adjudged, That he in reversion might take advantage and enter; for the estate for life was determined by the attainder, although it appeared the felony was pardoned. See after, *Copyholder convicted*.

No forfeiture of a *Felo de se* happens before an inquisition is taken and returned. *Sand.* 278, 362.

The husband takes copyhold lands of the lord, to whom the lord grants the seisin to hold to the husband and wife, it is a good grant to the wife, although she is not named until after the *Habeendum*. 1 *Saund.* 151.

A lord without a custom may seise the lands until the tenant comes in to be admitted, but cannot seise them as forfeited without a custom. 1 *Lev.* 63.

If he in remainder of a copyhold surrenders his remainder for the use of the tenant for life, and after his decease to the use of himself and his wife, the estate limited to the tenant for life is void; but the estate limited to the husband and the wife good by way of a present estate, but not by way of remainder. 1 *Saund.* 150, 151, 152.

But a surrender of a copyhold in fee, from the time of his death, is void. *Idem* 151. But custom to surrender to the use of his will, is good.

A copyholder convicted of felony, had clergy allowed before attainder; and the court was of opinion,

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opinion, that it was no forfeiture without a special custom. 1 *Lev.* 263.

If a covenant or agreement be to surrender a copyhold to the use of *A.* then a surrender into the hands of two copyholders, according to the custom, is sufficient. 1 *Lev.* 293.

A copyhold estate cannot be surrendered to another by attorney without deed; but one may be admitted to a copyhold estate without deed. *Pract Reg.* 170.

Admittance to a particular estate is admittance to the remainder; and no fine ought to be paid for admittance to a remainder without special custom: and a refusal to pay a fine upon a reasonable doubt of the custom is not forfeiture. 3 *Lev.* 308.

Copyhold land of the tenure of *Borough-English*, surrendered to the use of another person and his heirs, who dies before admittance, the right shall descend to the youngest son, because the admittance has reference to the surrender, and they both make but one act. 1 *Mod. Rep.* 102. 3 *Keb.* 263. 4 *Co.* 22. *b.*

If a copyholder for life surrender to the use of another, who is admitted, by this the first copyholder's estate is clearly determined; but if copyholder in fee surrenders to the use of another for life, after his death he shall have it again. *King and Lord's case.* *Hill.* 5 *Car.* 1. *B. R.* *Rot.* 793. *Cro.* 1. *Par.* 148. because in the first case he grants his whole interest, in the other only part of it.

If an infant surrender copyhold land to another, who is admitted, this is not good to bar the infant,

for he may enter at his full age. *Goole and Grane's case, Moor's Rep.*

If a woman copyholder take an husband who surrenders, this shall be no discontinuance to the wife, nor her heirs. *35 Eliz. Bullock and Dibley's case, 4 Co. Rep. 23.*

The lord of a manor seised a copyhold without cause, and granted it to another in fee; the grantee died, and his heir was admitted: Then the first copyholder died, and his heir entered upon the heir of the grantee, and surrendered to the use of a stranger; and here the heir's entry before admission was adjudged lawful, and his surrender to the use of a stranger good; and it was resolved, that the descent of a copyholder doth not toll or take away the entry of another copyholder who hath right. *2 Cro. Par. 36. and vide 4 Co. Rep. fol. 23.*

If a copyholder for life cut down trees, the lord may carry them away. *Pract. Reg. 170.*

If a copyholder commit waste, whereby a forfeiture accrue to the lord, who afterwards accepteth of rent, this doth not bar the lord, but he may enter for the forfeiture of the tenant, notwithstanding the acceptance of the rent. *Mich. 29 El. in B. R. Godb. 47. Quære, Whether the rent accrued after the forfeiture committed, and the lord's knowledge of it?*

If a copyholder forfeit his estate, and then surrenders to the lord, who accepts it, not knowing of the forfeiture, yet this is no dispensation of the forfeiture. *Hill. 4 Car. 1. Rot. 496. B. R. Matthews and Wheaton's case, 1 Cro. Par. 169.*

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A copyholder in fee took a lease for years of a manor: Resolved the copyhold was extinct for ever, and not only during the lease. *Hyde and Newport's case, Moor's Rep.*

If a feme copyholder in fee take an husband, who makes a lease for years contrary to the custom, after the husband's death this forfeiture shall not bind the feme and her heirs, but she shall have it again after her husband's death *non obstante* the forfeiture; and so it was adjudged *inter Savern and Smith* in the exchequer. *Cro. Rep. 1. Par. 7. Pasch. 1 Car. 1.*

A copyholder in fee surrendered to the lord of the manor his copyhold estate, and the lord made a lease for years of the manor and of the copyhold, by the name of his tenement called *H.* and whether by this the copyhold was determined or no, was the question: And it was held that it was not; because when the lord let the manor, it was included as a parcel thereof; but if he had made a lease for years of the copyhold by itself, that had destroyed the copyhold; for it was then during that time severed from the manor, and so could never again be demisable by copy. *M. 14 Car. 1. in B. R. Lee and Boothley's case. Cro. 1 Par. fol. 375.*

If a copyholder makes a lease for years, which is a forfeiture at the common law, and after the lord makes a feoffment, or a lease for years of the freehold of this copyhold, in this case the feoffee or lessee of the lord shall not take advantage of the forfeiture; for the lease of the freehold made by the lord before entry, is an assent that the lessee of the copyholder shall continue his estate; and so it is in nature of an affirmance and

confirmation of the lease. *M. 20 Eliz. in C. B. Penn and Merical's case. Owen's Rep. fol. 63.*

Every one who hath a lawful estate or interest in a manor, be it in fee-simple, fee-tail, dower, tenant by the curtesy, tenant for life, tenant for years, guardian, tenant by statute-merchant, staple or *elgit*, tenant at will and sufferance; if a copyhold escheat or come into their hands during the time, they may regrant it, and it shall bind the lord, because every one of them is *dominus pro tempore*. *Co. Lit. 58. Co. 4 Rep. 28, 29.*

If a copyholder accept of a lease for years of his copyhold, by this his copyhold estate is determined. *29 Eliz. Lane's case. Co. 2 Rep. 16.* because he has himself consented to an alteration of the tenure.

If the fine of copyholders of a manor upon admittance be incertain, yet the lord cannot demand or exact unreasonable or excessive fines; and if he do, the copyholder may by the law deny to pay them, and it is no forfeiture; and it shall be determined before the judges, upon proof of the value of the land, what fine was reasonable to be demanded; for if it should be otherwise, great part of the copyholds would be destroyed at the will of the lord, by exacting unreasonable fines. *Co. 4 Rep. 27. Latch's Rep. f. 14. acc'.*

If the lord assesses a reasonable fine, and requires the copyholder to pay it, he is not bound to pay it presently, because he could not know what the lord will assess, & *nemo tenetur divinare*, and he shall therefore have reasonable time to pay it in, if the lord limits no time; but it is otherwise of a fine certain, for of that he is bound to take notice. *Co. 4 Rep. f. 27.*

Note,

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Note, That no fine is due to the lord either upon surrender or descent, until admittance, for that is the cause of the fine, and if after the tenant deny to pay it, (if it be a reasonable fine) it is a forfeiture of the copyhold. *Bacon and Flatman's case*, and *Sand's case*, so resolved. *Vide Co. Rep. f. 28.*

If a copyholder come not to do his services, although he were often demanded to do them, but still puts off from time to time to do them, although he do not absolutely refuse, yet his deferring is a forfeiture. *Pasch. 2 Car. 1. in B. R. Johnson's case. Latch's Rep. f. 14.*

The lord of the manor assessed two years and half value of the land, according to the racked rent, for a fine upon the grant of a copyhold, and for non-payment thereof entered for a forfeiture: And it was held by the court of King's Bench, that the fine was unreasonable, and that one year and an half of improved rent was high enough; and therefore the lord's entry for the forfeiture was adjudged unlawful. *Hil. 5 Car. 1. in B. R. Dowe and Golding's case, Cro. 1. Par. 142. L. L. ibid.*

The lord assessed a fine of twelve pounds to be paid by a copyholder, and appoints it to be paid at his capital messuage of the manor three months after, and the copyholder pretending the fine to be certain, (that is to say, two years quit-rent) offered the same at the day of assessing the other fine; but at the appointed place for the payment thereof cometh not thither to excuse his nonpayment, nor make any other refusal; and it was held to be a forfeiture of his copyhold: But if he had come at the day assigned him for the payment,

and had then tendered the two years quit-rent, being the fine certain according to custom, though not assessed nor demanded by the lord, it had not been a forfeiture. 2 *Cro.* 617. *Latch's Rep.* 122.

It was adjudged, that copyhold lands were within the statute of 21 *Jac.* 1. c. 16. for limitation of entries within twenty years. *Pract. Reg.* 170. But see the late act 4 & 5 *Ann.* to commence an action within a year upon such entry or claim. But that copyhold is not within the statute of 12 *Car.* 2. touching guardians. *Idem* 171. *Vide* 3 *Lev.* 395. 2 *Lutw Ent.* 1139, 1140.

The statute of *Westminster* 2. [13 *Edw.* 1 Stat. 1.] c. 18. (which gives the *Elegit*) extends not to copyholds, for if it did, the lord would have a tenant brought in upon him, without either his admittance or even consent. *Gilb. Ten.* 160, 185, 242. *Sav.* 67. *Rel. Abr.* 888. *Cro. Car.* 44. *Hardr.* 433. *Old Bendl.* 163. 3 *Rep.* 9. 6 *Vin. Abr.* 169. pl. 4. 3 *Read Stat. Law.* 123. 2 *Inst.* 396. *Co. Copyb.* 149.

Copyholds are very seldom granted for years, but if they be so granted the executor of the termor must be admitted; and the lord is intitled to a fine, upon such admittance. *Bur. Rep.* 206, &c.

Tenants by the Verge,

Are after the same nature as tenants by copy of court-roll; but they are so called, for that when they will surrender their tenements into the lord's hands unto the use of another, they have a little
rod,

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rod, which, by custom of the manor, they deliver unto the steward or bailiff, and he, that takes the lands, receives the rod in court from the steward in the name of *Seisin*, and therefore they are called *Tenants by the Verge*: Yet they have no other evidence but copy of the court roll. *Lit. Ten. l. 1. c. 10.*

One had cut down timber upon a copyhold tenement, which was presented at a court-baron, and found to be waste, and consequently a forfeiture; whereupon the defendant was admitted, brought his ejectment, and had a verdict. The plaintiff brought her bill in equity to be relieved: And it being not proved that the plaintiff had sold any of the timber, and that the premises were much out of repair, an issue was directed to try if the waste was wilful; which being found for the plaintiff, it was decreed she should be relieved: And that the defendant should deliver her the possession again, and account for the mesne profits: But the lord chancellor said, in case it had appeared wilful waste, she should not have been relieved, *Mary Thomas, widow, v. Potter & al. Hil. 19 Car. 2. Chancery cases, 1 Par. f. 98.*

Copyholder before marriage agreed to settle his copyhold tenement on his intended wife; the marriage took effect, and the husband surrendered the said copyhold to a stranger for a sum of money by way of mortgage; he afterwards surrendered the premises to the use of his wife for life, which surrender was not presented at the next court; but the widow, however, procured herself to be admitted; and it was decreed by the court of chancery, that the wife being in, pursuant to a marriage-agreement, her estate should not be impeached;

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impeached; but had it been a meer voluntary settlement, it would have been otherwise. *Merlin v. Secmore in Canc. Trin. 22 Car. 2. Chancery Cases, 1 Part, p. 170.*

A copyholder having agreed for a valuable consideration to surrender his land, is but in the nature of a trustee for the vendee. *Ibid. p. 171.*

Where a copyholder in fee surrenders to the use of another for life, and the lessee dies, he shall not pay a fine for re-admittance to the reversion; for it continued always in him. *9 Co. Mary Podger's case, 107.*

And if such copyholder in fee surrenders to the use of one for life, remainder to a third person in fee, but one fine is due; for the particular estates and the remainders are but one estate. *Mich. 38 & 39 Eliz. B. R. by Popbam.*

If a copyholder incur a forfeiture by committing waste, and the lord afterwards accept the rent, he may enter for the forfeiture notwithstanding; for the copyhold was in him immediately by the forfeiture. *Mich. 29 Eliz. B. R. Godb. 47.*

Tenants in Coparcenary.

There be two kinds of tenants in coparcenary, that is, parceners at the common law, and parceners by custom.

After the course of the common law, when a man or woman is seised in lands or tenements in fee-simple, or fee-tail, and hath no other issue but daughters, and dieth, the tenements descend to the daughters equally as coheirs, and they shall enjoy every one an equal part thereof as tenants in coparcenary or copartnership, and are all as it were

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were one heir to their ancestors: And these co-heirs, or *parceners* may have a writ, called *Brevs de Partitione facienda*, to have the lands equally divided and shared amongst them.

If a man seised of lands die without issue, and the tenements descend to his *sisters*; or if he hath no *sisters*, and it descends to his aunts; they be coheirs or *parceners*, as aforesaid.

If there be two *parceners*, one marries and hath issue and dieth, and afterwards her husband holdeth one half, as tenant by the curtesy, the coheir or parcener that surviveth, and the tenant by the curtesy may make partition between them; and if the tenant by the curtesy will not consent thereunto, the surviving parcener may compel him by a writ *de partitione facienda*.

But if the tenant by the curtesy desires to have partition, and the parcener surviving will not agree to it, the tenant by the curtesy can have no remedy; for he cannot have a writ *de partitione facienda* against the surviving parcener, although the parcener may have it against him. See the late acts concerning partition.

See the Stat. 8 & 9 W. 3. c. 31. concerning partition of lands in coparcenary, jointenancy and tenancy in common.

By the Stat. 7 Ann. c. 18. Coparceners, jointenants and tenants in common, having made partition to present by turns, each shall be seised in law of his or her separate estate of the advowson, if it be an estate of inheritance.

Parceners by Custom.

This tenure is gavelkind, and is only used in Kent, except in some certain places in England besides,

besides, and in *North-Wales*. But the men of *Kent* only claim this as a right remaining unto them unconquered; and it is thus: If a man be seised in fee-simple or fee-tail, in lands or tenements of the custom and tenure of gavelkind, and hath issue divers sons and dieth, all the sons shall be *cobeirs*, and equally inherit those lands and tenements as females do, and may make partition by writ *de partitione facienda*, and divide, as in the case of daughters at the common law.

Grant of *Borough-English* lands to one and his heirs for three lives, the youngest son shall be heir. 2 *Lev.* 138.

Otherwise in gavelkind, of rent granted out of it, it should go against all as the land should. *Idem* 89.

A rent *de novo*, granted out of gavelkind land, shall descend according to the descent of the land. 1 *Mod. Rep.* 86, 96.

Joint-Tenants (a).

When a man being seised of certain lands and tenements, doth thereof enfeoff three or four, or

(a) Joint-tenants and tenants in common of any inheritance, are compellable to make partition by writ of partition, as coparceners are compellable to do at common law. *Stat.* 31 *H. 8. c. 1.*

And by *Stat.* 32 *H. 8. c. 32.* Joint tenants and tenants in common for lives or years, are compellable to make partition.

By the 8 & 9 *W. 3. c. 31.* an easier method of obtaining partition of lands in coparcenary, joint tenancy, and tenancy in common, is provided.

But these statutes do not concern copyholds.

more,

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more, to have and to hold to them and their heirs, or to hold to themselves for the term of their lives, or for another's life, and they become seised by virtue of that feoffment, these are said to be joint-tenants.

Likewise if two or more disseise another of any lands or tenements to their own use, the disseisors be joint-tenants; but if it be but to the use of one of them, they be not joint-tenants.

Now the nature of joint-tenants is, that the whole estate shall go to the survivor.

As if there be three joint-tenants in fee-simple, and the one of them hath issue, and dieth, the two that survives shall have the whole tenements, and nothing thereof shall go to the issue of him that is dead: And if the second tenant have issue and die, the third, who is survivor, shall enjoy the whole, and shall have it in fee-simple to him and his heirs.

But now there is a difference in tenants in parcenary: For if there be three *copartners*, and one hath issue, and dieth before there be any partition made, that part which belonged to her that is deceased shall descend to her issue; and if such a parcener die without issue, her part shall descend to her *cob heirs*: So that this they have by descent, and not by survivorship, as joint-tenants have.

And as the survivorship taketh place among joint-tenants, so it doth amongst all persons who have joint estate or possession with others in chattels real or personal.

As if a lease be made to several persons for term of years, the survivor of the lessees shall enjoy all the tenements during the term by virtue of the lease.

And

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And in like manner, goods and chattels personal, whereof there be partners, shall go to the survivor. And if a bond be made to many persons for one debt, and some of the obligees die, the survivor shall have all the debt. And so it is in all covenants and contracts amongst partners.

There may also be joint-tenants for term of life, and yet they have several inheritances: As,

If lands be given to two men to hold to them for term of their lives, and to the heirs of their two bodies, here these *donees* are joint-tenants for term of their lives, and have several inheritances: For if one of them have issue and die, the survivor shall enjoy the whole during his life by survivorship. And if the survivor have also issue and die, then the issue of them both shall enjoy the estate equally between them, as joint-tenants.

Now the reason why these are said to have several inheritances is, because it is impossible for them to have an heir between them, as a man and a woman may have.

Therefore the law maketh this distinction according to reason and the form of the gift; that is to the heirs that one getteth on the body of his wife; and so likewise of the other: So that by this reason it must of necessity be, that they have several inheritances.

And if after the death of the *donees*, the issue of one of the *donees* die also, leaving no issue of his body surviving, in this case the *donor* or his heirs may enter into the moiety of the lands, as in his reversion, though the other of the *donees* hath issue living.

In

In like manner, if lands be given to two females, and to the heirs of one of them, in this case the one of them, that is, she that hath it but for life, hath a freehold; and the other hath a fee-simple: And if she that hath a fee die, the other who hath the freehold shall enjoy the whole during her life, by virtue of her survivorship.

And if tenements be given to two, and to the heirs to be ingendered of the body of one of them; here the one hath a freehold, and the other fee-tail.

If there be two joint-tenants, and they be seised of an estate in fee-simple, and the one by deed grants a rent-charge to another out of that part which appertains to him, now, during the life of the grantor, this rent-charge is good and effectual, but it becomes void after the death of the grantor; for the tenant that surviveth shall hold all the land by survivorship, discharged from the rent-charge of the other.

If there be two joint-tenants for life, and one lets his part for years, rendering rent, and dies, the term shall continue against the survivor, but the rent is gone. *Finch, lib. 1. c. 3. p. 13. Dyer 187.*

But amongst coheirs or parceners it is otherwise; for if there be two parceners in tenements in fee-simple, and before partition one chargeth his part by his deed with a rent-charge, and dieth, leaving no issue, whereby his moiety descends to the other partner; here that part shall not be freed of the rent-charge, because he cometh to this moiety by descent as heir by law.

If joint-tenants be desirous to make partition between them, they may do it by consent and agree-

agreement amongst themselves ; and such partition is good and binding against each other : But unless it be done by mutual consent amongst themselves, the law cannot enforce or compel them, or either of them, to do it ; because joint-tenants cannot have a writ *de partitione facienda*, as tenants in copartnership may have. But see the late statute *postea*, p. 45.

If there be a joint estate of lands and tenements made to a man and his wife, and to a third person ; here the third person shall have as much as the man and his wife ; that is one moiety : For the man and wife can have but half the estate, because they are but one person in law.

In like manner it is, if lands were made to a man and his wife, and two others ; here the man and wife can have but a third part, and the two others the other two parts.

Tenants in Common.

Such as have lands and tenements by several titles, and not joint titles, and none of them knoweth what is several to him, *i. e.* that they hold the land *pro indiviso*, whether it be in fee-simple, fee-tail, or for term of life ; these are said to be tenants in common, because they ought by the law to hold, enjoy and occupy the lands and tenements in common and undivided, and to take profits in common, as coming to the same lands and tenements by several titles, and not by one joint title.

If a man enfeoff two joint-tenants in fee, and one of them *alien*s his part to another in fee, this *alien*ce and the other joint tenant are tenants in common,

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common, because they now stand seised by several titles ; the joint-tenant by virtue of the first feoffment made to him and the other, and the *alienee* by virtue of the feoffment of the other joint-tenant ; so that the several feoffments make their titles several, whereby they become tenants in common.

If there be three joint-tenants, and one of them *aliens* his part to another person in fee, here the *alienee* is tenant in common with the other two joint-tenants, and of the other two parts the joint-tenants be seised jointly, and the survivor of them shall have the whole of those two parts by virtue of survivorship.

If there be two joint-tenants in fee, and one of them gives his part to another in tail, here the *donee* and the other joint-tenant become tenants in common.

Also if lands be given to two men, and to the heirs of their two bodies ; in this case those *donees* have a joint estate during their lives ; and if both of them have issue and die, both their issues shall hold the land as tenants in common.

If lands be given to two men and their heirs, to hold to each a moiety, these are tenants in common.

If a man, being seised in certain lands, doth enfeoff another in the half of it, without limiting of the same half in severalty at the time of the feoffment made, that is, do not distinguish that half from the other by particular bounds and limits, in this case the *feoffor* and the *feoffee* shall hold their parts of those lands in common.

And as it is amongst tenants in common in lands or tenements in fee-simple or fee-tail, in the same

same nature it also is between tenants for term of life: As if there be two joint-tenants seised in fee, and one of them lets to a man his part for term of his life, and the other joint-tenant lets to another man his part for term of life; these two lessees be tenants in common for the term of their lives.

Likewise, if a man lets lands unto two persons for the term of their lives, and the one of them grants all his estate of the part belonging unto him unto a third person; then the third person, to whom this grant is made, and the other tenant for term of life, be both tenants in common during the lives of both the lessees.

If there be three joint-tenants, and one of them releaseth all his right which he hath in the land by his deed to one of his fellows, then he to whom the release is made hath the third part of the lands by virtue of that release, and shall hold that third part with himself and his fellow in common, and they two shall hold the other two parts jointly.

Also if a joint estate be made unto a man and his wife, and to a third person, and that third person releaseth his right which he hath in that estate to the husband, then the husband hath the third person's moiety, and the wife hath nothing therein at all.

And if such third person release his right in his moiety to the wife, not naming her husband in the release, then the wife hath the third person's moiety, and the husband hath nothing at all in it, but only *jure uxoris*, in the right of his wife; because the release shall work to invest the estate in the person to whom the release is made, for all that appertained to him that made such release.

There

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There may be also tenants in common by title of prescription ; that is, when two have holden lands in common undivided, the one, one half from his ancestors, and the other, the other half from his ancestors, or from whom the estate is derived unto them undivided, time whereof the memory of man hath not known to the contrary, these are tenants in common, by title of prescription.

Now these tenants in common ought in some cases to have, for the maintenance of their possession, several actions ; and in some cases they shall all join in one action : For if there be two tenants in common, and they be disseised, they two cannot bring against the disseisor one assize in both their names, but they must have against him two assizes ; for every of them ought to have an assize of his half, because the tenants in common are seised by several titles.

But amongst joint-tenants it is otherwise ; for if there be never so many of them, and they be disseised, they shall have but one assize in all their names, because they have all but one joint title.

It hath been formerly held, that an action on the case lay not for one tenant in common, &c. against another who disposes of the whole. 1 Lev. 29, &c.

But by the late act for amendment of the law, 4 & 5 Ann. it is enacted, *That actions of accounts may be brought and maintained against the executors and administrators of every guardian, bailiff or receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant, or tenant in common.*

There

There is likewise a difference in suing real actions between partners that be in by divers descents and tenants in common: For if a man, who is seised of lands in fee, dieth, leaving only two daughters his coheirs, and these two daughters enter, and have each of them a son, and die without making any partition between them, so that the lands descend equally to their two sons, the one moiety to one of them, and the other to the other, and they enter and enjoy the same in common, and be disseised; they shall not in this case bring two assizes, but one assize in both their names: For though they came in by divers descents, yet they be parceners, and a writ *de partitione facienda* lieth between them. Nevertheless they be not parceners by reason of the seisin and possession which they have from their mothers, but in respect to their estates which descended to their mothers from their grandfather.

And so in respect and consideration of their first descent that was to their mothers, they have a title in parcenary, which maketh them parceners; and they be but as one heir to their common ancestor, their grandfather, from whom the land descended to their mothers. And therefore, before partition made between them, they should have but one assize, though they came in by several descents.

And likewise in personal actions, in trespass, and such like cases which concern their tenements in common, the tenants in common ought to bring such personal actions jointly in all their names; as for breaking their houses, closes or pastures, wasting treading down, or otherwis: spoiling the grass, cutting or selling of their woods, spoiling
their

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their fruit-trees, fishing in their ponds, and such like; in these and all such kind of actions wherein they are jointly concerned, the tenants in common shall have one joint action, and recover damages jointly.

Likewise, if two tenants in common make a lease of their two tenements to another for term of years, reserving unto themselves a certain yearly rent, if the rent be in arrear, they shall have one action of debt for the rent against the lessee in both their names, and not divers actions.

If two persons or more have chattels real or personal in common and by divers titles, if one of them die, the other who survives shall not have his part that is dead in those chattels by survivorship, but the executors of him that dieth shall hold and enjoy his part with them that survive, as the testator did or ought to have done in his life-time.

If two persons have an estate in common for term of years, and one of them puts the other out of his possession, and enjoys all himself, then he that is so put out of possession may bring his ejectment against the other for his moiety.

But if two persons be possessed of chattels personal in common by divers titles, as of an horse, or an ox, or a cow, or the like; and one of them takes it into his own possession from the other; the other hath no remedy, but to take this from him that hath done him the injury again, to occupy in common, when he hath an opportunity; that is in plain terms, he may come by it as well as he can. *Vide* the act for amendment of the law, p. 45. this work.

The

The essential difference between joint-tenants and tenants in common, is, that joint-tenants have the land by one joint title and in one right, and tenants in common by several titles, or by one title and several rights; and this is the reason that joint-tenants have one joint-freehold, and tenants in common several freeholds.

There are also tenants in antient demesne;

Of whose tenures and privileges you may read at large in Mr. *D'Anvers's* general abridgment 657, &c. Tit. *Antient Demesne*.

There are also several other tenants besides the aforementioned, as tenant by *Elegit*, tenant by statute merchant, tenant by statute-staple, tenant in mortgage, &c.

Some Observations as to Mortgages.

That where lands are mortgaged thrice over, the third mortgagee may buy in the first incumbrance to protect his own mortgage, and he hath both law and equity for him. 2 *Vent.* 338.

That he shall hold the land against the second mortgagee until he be satisfied both the money he paid the first mortgagee, and also his own which he lent upon the last mortgage. *Ibid.*

But where only part of the lands are mortgaged to the first, and the whole to the second, and after to the third; if the third buys in the first title, it shall protect only that part that is in the first mortgage. *Idem* 339.

That a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing a precedent incumbrance, it shall protect his estate, though he purchased in the incumbrance

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cumbrance after notice of a second mortgage.
Ibid.

That mortgages are not relieveable in chancery after twenty years, for the statute of 21 Jac. 1. c. 16. limits the time of entry to that number of years, &c. and equity in that case follows the law.
Idem 340.

That upon a mortgage in fee the redemption-money shall be paid to the executor, and not to the heir. *Idem* 338, 351.

That the court of chancery cannot shorten the time that is given by express covenant and agreement of the parties, but when that time is past, then the practice is to foreclose. *Idem* 365.

But *Note*; The practice of chancery is now otherwise: For though there be an express covenant in the mortgage deed, if the money be not repaid at the day, the mortgager shall be absolutely foreclosed, &c. yet if it appear that the money lent is not an equitable consideration, the court will not only enlarge the time for payment, but order the mortgagee to reconvey the estate on payment of principal, interests and costs, within six, nine, or perhaps twelve months after the time limited in the deed.

Also, though the covenant or agreement be, That if the money be not repaid at the day, then on payment of a farther sum in certain, the mortgage to be absolute; or though more money to be lent to the mortgager after the mortgage, or even after the forfeiture, yet if there appear to be no hardship on the mortgagee, or that the money so lent is not a sufficient equitable consideration for the estate, the chancery will compel the

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mortgagee

mortgagee to reconvey on payment of principal, interest, costs and damages.

But by *Stat. 4 & 5 W. & M. c. 16.* if a man mortgages his lands or estate twice, and does not declare or give notice to the second mortgagee of the former mortgage, or within six months clear it, he loses the equity of redemption to the second mortgagee, and he himself will stand foreclosed.

And *Note*; The judges at common law may and ought judicially to take notice of mortgages and equities of redemption, and therein guide themselves by rule of equity, rather than by the strict rules of law; for nothing has more contributed to the exorbitant power of chancery than their over-fondness for what they call maxims of law.

By *Stat. 7 Geo. 2. c. 20. sect. 1.* "Where any action shall be brought on any bond for payment of money secured by mortgage, or performance of the covenants therein contained, or where any ejectment shall be brought by any mortgagee, and no suit shall be depending in equity for foreclosing or redeeming such mortgaged lands; if the person having right to redeem, and who shall appear and become defendant, shall pending such action pay unto such mortgagee, or in case of refusal bring into court the principal and interest due on such mortgage, and all such costs as have been expended in any suits of law or equity upon such mortgage (such principal, interest and costs, to be ascertained by the court where such action is depending, or by the proper officer by such court to be appointed) the monies paid to such mortgagee, or brought into such court, shall be in satisfaction of such mortgage, and the court shall
I discharge

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discharge such mortgagor or defendant from the same, and shall by rule of court compel such mortgagee, at the costs of such mortgagor, to reconvey such mortgaged lands, and deliver up all writings in his custody relating to the title."

By Sect. 2. "Where any bill shall be filed in equity by any person claiming interest in lands under any mortgage, to compel the defendant claiming right to redeem, to pay the plaintiff the principal and interest due on such mortgage, or the principal and interest together with any money due on any incumbrance chargeable on the equity of redemption thereof, and in default of payment to foreclose; the court of equity upon application by the defendant having right to redeem, and upon his admitting the title of the plaintiff, shall at any time before such cause shall be brought to hearing, make such decree therein as such court might have made in case such cause had been regularly brought to hearing."

By Sect. 3. "This act shall not extend to any case, where the persons, against whom redemption shall be prayed, shall (by writing delivered, before the money shall be brought into court, to the attorney or solicitor for the other side) insist, either that the party praying redemption has not right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage; nor to any case where the right of redemption shall be controverted between different defendants; nor shall be any prejudice to subsequent mortgagees or incumbrancers"

C H A P. II.

Of Leases, Covenants and Conditions; Proviso's and Reservations, Surrenders and Assignments of leases.

IN all leases, as we have said before in the title of *tenant for term of years*, there must be lessor and lessee: He which demises or lets land to farm, is the lessor; and he who takes the land, that is, unto whom it is so let or demised, is called the lessee; in more vulgar terms understood by the title of *Landlord and Tenant*.

According to our general and common acceptance now-a-days, every lessee for life, years, or at will, though it be but of a cottage, or never so small a tenement or house, is called a *Firmor* or farmer, and the premises a firm or farm; so we say in the writ, *a firma sua ejecit*, so called, *quia possessio firma, & non precaria*, as tenant at will.

But antiently the chief messuage in a parish or county town was called, by way of pre-eminency, a farm; and unto this farm belonged great *demesnes* of all sorts, as gardens, meadows, pastures, rivers, woods, moors, waters, marshes, furzes, heath, and also messuages, houses, tofts, mills, and the like: And all those are comprehended under the title of lands. These *demesnes* were used to be let out to others for term of life, years or at will. Of leases by parol or word of mouth, &c. *Vide Ante*, p. 12, 13.

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These antient farms (or firms, which you will call them; which appellation or dialect differs according to the county: In *Essex*, *Norfolk* and *Suffolk*, they call them farms and fermors; but in the West are called farms and farmers :) These farms, I say, attained to this title from the old *Saxon* word *feormion*, which signifies to feed, provide or yield victuals; so that a farmer signifies a victualler; for antiently the landlords did not receive money upon their leases for their rent, but corn and victuals, being such as the farm yielded of its growth, until it came by degrees into part money and part victuals; and at last, about the time of king *Henry* the first, the rent reserved was turned into money, and so hath hitherto continued amongst most men.

Yet amongst some, where the antient rents or reservations are not altered, the rent is in corn or victuals to this day, especially in college and church leases; and doubtless many of those antient reservations received their utmost period in the general dissolution of the religious houses, to the no small detriment of the industrious farmer. *Co. 7 Par. f. 13.*

All leases for years reserving rent must be made of lands and tenements, whereunto the lessor may come to distrain; so that a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, tithes, fairs, markets, liberties, franchises, and the like; But if a lease be made by deed in writing of one of them, one may have an action of debt by way of contract, but one cannot distrain: But if any rent be reserved in such cases upon a lease for life,

it is utterly void. *Co. 1 Par. Inst. p. 47. Co. 7. 23.*

By *Holt* chief justice, if *A.* not having any thing in certain land, demises it by indenture to *B.* and afterwards *A.* purchases the land, this will be a good lease by estoppel; but if it appear by recitals in the lease that *A.* had nothing at the time of the demise, and afterwards he purchases the land as aforesaid, that will not enure by estoppel. *1 Lord Raym. 729. Hermitage and Tomkins.*

A tenant for life leased for years, the lessee assigns to him by parol, without deed, rendering rent: It was said by the chief justice, that although this assignment by operation of the law turned to a surrender, yet it was not an express surrender; and if the rent was not good by way of reservation, it was good by way of contract; and so judgment was given for the plaintiff, although all the days were not passed. *2 Lev. 80.*

Note, That every quarter's rent is a several debt, and distinct actions may be brought for each quarter's rent. *1 Vent. 129.*

Also a debt for rent is payable by an executor before bonds, because it favours of the realty, and is maintained in regard of the profits of the land received. *Idem 184.*

Action of debt lies for the lessor against an assignee of a moiety of the land, for the moiety of rent. *2 Lev. 231.*

Leases for term of years are chattels; so that if a man have a lease of lands for five hundred years, it is a chattel, and goes to his executor or administrator,

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administrator, if he dispose not otherwise of it before his death. 32 or 23 *Lib. Aff.* 6.

That a lease for years, although it be a very long lease, cannot be intailed, (but may be assigned in trust to several uses, which may be an entail in effect): For the nature of a chattel cannot be turned into an inheritance. *Pract. Reg.* 400. *Idem* 401.

That if a lease for years comes to be limited in tail, the law allows not a present remainder to be limited thereupon; yet it will allow a future estate arising upon a contingency only; and that to wear out in a short time. By the lord chancellor *Finch* in the duke of *Norfolk's* case, *fa.* 27. and the courts of equity have since extended this doctrine.

Every man who is seised of lands in fee-simple may lease out his lands for what time or term he pleaseth himself: And so likewise might bishops have done formerly before the statutes restrained them. 32 *H. 8. c.* 28. 13 *Eliz. c.* 10. 18 *El. c.* 6.

A tenant in tail being at age may by deed in writing lease out such lands as have been let to farm twenty years next before the lease made, reserving the old rent or more; not exceeding three lives or twenty-one years: The words [*without impeachment of waste*] must be omitted in it, and it must commence from the day of the making or date. And if there be an old lease in being, it must be surrendered, expired or ended within one year after the making of the new one, or else it is void. And a lease thus made binds the issue of the tenant in tail, if he die before the term be out: But if the tenant in tail die without issue;

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the donor may avoid the lease by his entry, and so may he in remainder; and though he accept the rent, yet he doth not thereby confirm the lease.

Vide 1 Jac. c. 3. Hern's Con. 62, 67, &c.

A man that is seised of lands in fee-simple or fee-tail in the right of his wife, may make a lease by indenture in writing of his wife's land, in the name of himself and his wife, and she to seal thereunto, reserving the rent to himself and his wife and to the heirs of his wife; this lease shall be good against the woman and her heirs after her death.

Bishops, deans and chapters observing the rules, may make leases of such estates as they are seised of in fee, in right of their churches: And so may masters, provosts and fellows of colleges, and wardens of hospitals, if they be not prohibited by the private statutes of their foundations. *Vide 32 H. 8. c. 28, &c. as follows.*

LEASES by Statute Law.

I. *Stat. 32 H. 8. 28.* Leases made by tenant in tail, or by him who is seised in the right of his wife or church (they being of full age at the time of such lease made) shall be good and effectual in the law against the lessors, their wives, heirs and successors.

II. The statute shall not extend to any lease to be made of lands, in the hands of any farmer by force of any old lease, unless such old lease expired within a year after the making of the new; or to any grant to be made of any reversion of manors, lands, &c. nor

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to any lease of such manors, lands, &c. which have not been let to farm, or occupied by farmers, twenty years before such lease made; nor to any lease to be made without impeachment of waste, nor any lease to be made for above twenty-one years, or three lives, from the day of the making thereof; and that upon every such lease there be reserved so much yearly rent as hath been usually paid for the lands so let, within twenty years next before such lease made; and the reversioners of the manors, lands, &c. so let (after the death of such lessor or his heirs) may have such remedy against such lessee, his executors and assigns, as such lessor might have had against such lessee.

III. Provided, That all leases made by the husband of manors, lands, &c. (being the inheritance of the wife) shall be made by indenture, in the name of the husband and wife, and she to seal to the same, and the rent shall be reserved to the husband and wife, and to the heirs of the wife. And here the husband shall not alien or discharge the rent, or any part thereof, longer than during the coverture, unless it be by fine levied by husband and wife.

IV. This act shall not extend to give liberty to take more farms or leases than might have been taken before this act, (*Vide Stat. 25 H. 8. c. 13.* that none shall hold above two farms together) nor to any parson or vicar, to make any lease otherwise than they might have done before.

V. All leases for years made within three years before the 12th of April 31 H. 8. by writing indented, under seal of any person or persons of full age, *sane memory*, not unlawfully coerced, nor covert baron, of any manors, lands, &c. wherein

he or they have an estate of inheritance to his or their own use at the time of the making thereof, and whereof the lessee or lessees, or their assigns, have now the possession by force of such lease or leases, and no cause of re-entry or forfeiture thereof had or made, shall be good in law against such lessors, their heirs and successors; so as so much yearly rent be reserved for the same, as was paid for the same within twenty years next before the making of such lease or leases; or else such lease or leases to be of no other force than they were before the making of this act.

VI. No fine, feoffment or other act done by the husband only, of the inheritance of freehold of the wife, shall make any discontinuance, or prejudice the wife, or any other who is to enjoy it after her decease; the fines levied by the husband and wife only excepted.

VII. This act shall not give liberty to the wife and her heirs to avoid any lease hereafter to be made of the wife's inheritance, by the husband and wife for one and twenty years and under, or three lives; whereupon the accustomed yearly rent for twenty years before is reserved, according to the tenor of this act.

VIII. This act shall not extend to make good any lease made by any ecclesiastical person, which is made void by authority of parliament, or by any such person or other now attainted of treason.

IX. *Stat. 1 Eliz. not printed. (Vide Abr. of Stat. Tit. Leases p. 401.)* All estates made by an archbishop or other bishop, of any manors, lands, &c. parcel of the possessions of their bishoprick, or united or appertaining thereto, to any person or persons,
body

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body politick or corporate, other than to the queen, her heirs and successors, and other than for the term of one and twenty years, or three lives from the time of such estate made, and whereupon the accustomed yearly rent or more shall be reserved or payable yearly, during such term of one and twenty years or three lives, shall be void to all intents and purposes.

X. *Stat. 13 Eliz. 10.* All grants, feoffments, leases, and other conveyances and estates, made by any master or fellow of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other (a) having any spiritual or ecclesiastical living, or any houses, lands, tithes, or other hereditaments, being parcel of their college, cathedral, chapter, hospital, parsonage, vicarage or other spiritual promotion, or belonging thereunto, other than for one and twenty years or three lives from the making thereof, and whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the term, shall be utterly void.

XI. This act shall not make good any lease or other grant against the private statutes of any college or collegiate church.

XII. This act shall not extend to any lease hereafter to be made upon a surrender of a former lease, or by reason of any covenant or condition contained in any former lease, and still continuing;

(a) The words, *or any other, &c.* coming after parson or vicar, will not comprehend bishops, who are of an order that is superior. *Vide 4 Rep. 76.*

so as the lease to made contain not more years than the residue of the years of such former lease, nor any less rent than is thereby reserved. This is a publick act.

XIII. *Stat. 13 Eliz. c. 20.* No lease made of any benefice or ecclesiastical promotion with *cure*, or any part thereof, (and not impropriated) shall endure any longer than while the lessor shall be ordinarily resident and serving the *cure* of such benefice, without absence above eight days in any one year; but that every such lease, *so soon as it, or part thereof, shall come into any possession or use above forbidden*, or immediately, upon such absence, shall cease and be void; and the incumbent so offending shall lose a year's profit of his benefice, to be distributed by the ordinary among the poor of the parish. Yet see *Dogge's Parson's Counsellor* 229.

XIV. Provided, that every parson allowed to have two benefices may demise one of them (upon which he is not most ordinarily resident) to his curate only; but such lease shall endure no longer than during such curate's residence, without absence above forty days in one year.

XV. *Stat. 14 El. 11.* In the statute 13 *El. 20.* these words [*So soon as it or any part thereof shall come into any possession or use above forbidden, or*] repealed.

XVI. All bonds, contracts, promises and covenants hereafter to be made, for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion, with *cure*; or to take the fruits thereof (other than such bonds and covenants made for assurance of any lease heretofore made) shall be admitted of such validity (and no otherwise than) as leases thereof made: The like law

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is of leases, bonds, promises or covenants made by curates.

XVII. The branch of the statute of 13 *El.* 10. made to avoid certain leases made by certain persons having spiritual livings, shall not extend to houses situate in corporations or market towns, or the suburbs thereof, nor under the grounds appertaining to such houses, so as they be not the dwelling-houses of such persons, nor have above ten acres of ground belonging to them.

XVIII. Provided, that no lease shall be made, by force of this act, in reversion, or without reserving the accustomed yearly rent at least, or without charging the lessee with reparations, or for longer term than forty years. Neither shall any such houses be aliened, without purchasing presently after other lands in fee-simple, of as good value, and as great yearly rent, as the houses so alienated.

XIX. *Stat* 18 *El.* 6. Upon leases made by colleges in the two universities, *Winchester* and *Eaton*, the third part of the rent shall be reserved in grain, to be delivered to them yearly at days prefixed, after the rate of 6 *s.* 8 *d.* for a quarter of wheat, and 5 *s.* for a quarter of malt, or under those prices: Or it shall be in the election of the lessee to pay them in kind, at the best rates found in those several markets respectively the next market-days before the day prefixed for the payment or delivery thereof; and all leases otherwise made, and all bonds and assurances given to the contrary, shall be void: Which said grain or money shall be expended for the relief of the commons and diet of the said colleges respectively without fraud, in pain of deprivation of the chief

rulers of such colleges respectively, and of all others consenting thereunto.

XX. This act shall not extend to any lease to be made by the president and scholars of *St. John's college in Oxford*, of the manor of *Fisfield*, to the heir male of *Sir Thomas White*, knight, late alderman of *London*, and founder of the said college.

XXI. *Stat. 18 Eliz. 6.* All leases made by such persons as are mentioned in the *Stat. 13 El. 10.* where another lease is in being, and not to be expired, surrendered, or ended, within three years next after the making of such new lease, shall be void: And all bonds and covenants for renewing of any such lease contrary to this act, or to the said statute of *13 El. 10.* shall also be void. Howbeit, this act shall not extend to any lease or leases heretofore made by any such person or persons.

XXII. After complaint to the ordinary, and sentence given upon any offence committed by the incumbent against the *Stat.* of *13 El. 20.* whereby he ought to lose the profits of his benefice; the ordinary, within two months after such sentence given, and request made by the church-wardens, or one of them, shall grant the sequestration thereof to such inhabitant or inhabitants there, as to him shall seem convenient; and upon default in the ordinary, it shall be lawful for every parishioner there to retain his tithes, and for the church-wardens to take the profits of the glebe, and other rents and duties of such benefice, to be employed to the use of the poor, until the sequestration shall be committed by the ordinary; and then the church-wardens and parishioners are to account
to

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to him or them to whom such sequestration shall be committed, and he or they shall employ the said profits to such uses, as by the said statute of 13 *El.* 20, are appointed, in pain to forfeit the double value of the profits with-holden, to be recovered in the ecclesiastical court by the poor of the parish.

XXIII. *Stat.* 43 *Eliz.* 9. All judgments hereafter to be had for the intent to have or enjoy any lease contrary to the statutes of 13 *El.* 20. 14 *El.* 11. and 18 *El.* 11. or any of them, shall be deemed void, in such sort as bonds and covenants are appointed to be void, which are made for that purpose.

XXIV. *Stat.* 12 *Car.* 2. c. 31. Leases and grants by colleges and hospitals, and elections of heads, masters and fellows, made during the late troubles, confirmed under some exceptions and provisoes.

XXV. *Stat.* 13 *Car.* 2. c. 4. The king enabled to make leases, grants, and copies of offices, lands, tenements and hereditaments, parcel of the dutchy of *Cornwal*, and a confirmation of such as be made not exceeding one and thirty years, or three lives.

If bishops, deans and chapters, observe not the aforesaid rules in their demises, yet their leases shall be good against themselves for their lives. *Vide Co. Lit.* 45. a. 1. *Brownl.* 21. *Leon.* 131.

Generally a lease for years must be for a time certain, and ought to express the term, and when it should begin, and when it should end certainly; and therefore a lease for a year, and so from year to year, is a lease for two years.

By *Stat.* 5 *Geo.* 3. c. 17. *sect.* 1. "All leases for one, two, or three life or lives, or any term
not

not exceeding twenty-one years, already made and granted, or which shall be granted, of any tythes, tolls, or other incorporeal hereditaments, solely, and without any lands or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who are enabled by the several statutes now in being, or any of them, to make any lease or leases for one, two, or three life or lives, or any term or number of years not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, shall be deemed as good and effectual in law against the persons granting the same and their successors, to all intents and purposes, as any lease or leases already made or to be made by such persons, of any lands or other corporeal hereditaments now are, by virtue of the statute of 32 *Hen.* 8. or any other statute now in being."

By Sect. 2. "But no master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons as aforesaid, may grant leases for any longer or other terms, than, by the local statutes of their several foundations, they are now respectively enabled to do."

By Sect. 3. "If the reserved rent in any lease or leases already made, or to be made, for one, two, or three life or lives, or years, as aforesaid, in pursuance of the several acts already in being, or by this present act, shall be unpaid by the space of twenty-eight days after any of the days wherein the same are made payable; the

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the persons granting such leases, or their executors, administrators, and successors respectively, may bring an action of debt against the lessee or lessees, their heirs, executors, administrators, or assigns, for recovering the same, in the same manner, and as fully and effectually, as any landlord or lessor, or other person, might do for recovering of arrears of rent due on any lease or leases for life or lives, or years, by the laws now in being."

By Sect. 4. This act shall be deemed a publick act and be judicially taken notice of as such, in all courts of law and equity, without specially pleading the same."

Also a lease from year to year, so long as both parties please, after entry in any year, is a lease for that year, &c. until warning be given to depart. *Noy's Max.* 65.

A lease which is only voidable, and not absolutely void, must be made void by the lessor's re-entry, (if he will) and putting out the lessee: Or else it may be continued or affirmed by receiving the rent. *Pract. Reg.* last pub. 399.

Also where there is a clause in the lease, that if the rent be behind and unpaid at such a day, &c. the lease shall be void: Now if there was a demand made at the day, and the rent not paid, this lease is not absolutely void until an actual entry; it is only voidable; and the acceptance of the rent before any entry made, shall make that, which was a voidable lease, a good lease. *Idem.* *Nam quilibet potest renunciare juri pro se introducto.*

If a lessee for years grant a rent-charge, and after surrender, yet for the benefit of the grantee the term hath continuance, although in *rei veritate* it is determined, and the grantor himself shall not derogate

derogate from his own grant, to make it void at his pleasure.

Tenant for years of an advowson granteth the next avoidance and donation, if the same church should become void during the term, &c. and afterwards surrenders his term, yet if the next avoidance be within the term, the grant is good, for the years cannot determine but by the effluxion of time, and the law implies a limitation, if the church do become void during the term. *Quia expressio eorum quæ tacite insunt nihil operatur.*

A lessee covenanteth for himself, his executors and administrators, with the lessor, that he, his executors or assigns, shall build a brick wall upon part of the demised premises, and afterwards the lessee makes an assignment of his lease to C. D. for his term: in this case the assignee is not bound to build the wall, because the things were only collateral, and were not *in esse*, nor part of the demise, &c. *Godb. Rep.* 69, 70, &c. *5 Co.* 16, 17.

But *Note*; Where the lessee has built a wall or house on the premises, and afterwards assigns his term, the assignee is bound to keep such wall or house in reparation.

When a covenant extends to a thing in being, parcel of the demise, then the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall bind the assignee, although by express words in the covenant he be not bound. *Vide 5 Co.* 17, 24. *Dyer* 27.

But if the covenant extends to a thing which had no being at the time of the demise made, that
cannot

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cannot be annexed or appurtenant to a thing which had no being. *Ibid.*

If a lessee covenants to repair the houses demised to him during his lease, this is part of the contract, and shall bind the assignee, although by the covenant he is not expressly named. *Ibid.*

But where the covenant concerns a thing not in being at the time of the demise, but to be made after, this shall bind the covenantor, his executors and administrators, but not the assignee. *Ibid.*

If a lessee covenants for him and his assigns to build a house upon the land of the lessor, which is not parcel of the demise, or to pay any collateral sum of money to the lessor, or to a stranger, this shall not bind the assignee. *Ibid. Quare.*

If a man demise lands for years with a stock of cattle, or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock of cattle or the sum of money at the end of the term, this covenant shall not charge the assignee. *See after Chap. X.*

If an assignee of a lease be evicted, he may have a writ of covenant; so shall a tenant by statute, or by *elgit*, or he to whom a lease is sold by virtue of an execution.

If a man grant to a lessee for term of years, that he shall have so many *estovers* as shall serve to repair his house, or that he shall burn in his house, or the like, during the term, that is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh. *Co. Inst. 41.*

The

The statute extendeth only to covenants which touch the thing demised, and not to collateral covenants. 32 H. 8. c. 24. *Vide ante.*

An assignee of an assignee, executors of an assignee, assigns of executors or administrators of every assignee, may have an action of covenant, for all are comprised within this word [Assignee], and the same right that was in the testator or intestate, descends to the executors or administrators. *Cok. l. 5.*

A lessor may have an action for rent against the executor of the lessee, after an assignment made by him. *Leon. 127. 2 Vent. 209.*

If an assignee assigns over, until notice given of the assignment to the lessor, and tender of arrears, he cannot by the assignment discharge himself of the rent. 1 *Lev. 215.* But that the executor of a lessee may assign before rent arrear without notice. 3 *Lev. 295.*

A lessee for an hundred years being out of possession cannot assign. 1 *Lev. 270.*

Lessor assigns his rent upon a lease for years, and the lessee attorns, it is said the grantee may maintain an action of debt for the rent. 1 *Lev. 22.*

A lease is made for life, the remainder over for life, the remainder over in fee; the first lessee maketh waste: And because he in the fee hath no remedy by the common law, and waste is a wrong prohibited, he shall have relief in chancery. *Crompt. 49. b.*

A woman sole takes a consideration for making a lease for one and twenty years, and then marries; and she and her husband made the promised lease; before the end of that term the lessee surrenders,
and

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and takes a new lease for one and twenty years more; the husband dies, the wife ousts the lessee, who sues in chancery to have the first lease continued for the first one and twenty years, and could not have remedy, because the surrender was voluntary, and the court gives no relief against a voluntary act.

Concerning leases, &c. by baron and feme, see *D'Anvers's Gen. Abr. Tit. Baron and Feme*, fol. 698, 699, 700, &c.

Also where a man shall be relieved in chancery against deeds and leases, see *D'Anvers's Gen. Abr. Tit. Chancery* and *Tit. Leases*.

A lease is made of a house and wood, wherein it is covenanted, that the lessee shall have house-boot and fire-boot; by this it is implied and meant, that he should not have any of the woods to use, or convert to any other purpose; but that they do belong to the lessor: And the lessor shall have help in chancery, leaving to the lessee sufficient for house-boot and fire-boot.

Under the name of lands are comprehended not only gardens, meadows, pastures, rivers, woods, moors, waters, marshes, furze and heath, but also messuages, houses, tofts, mills, castles, and such like, *Co. Lit. l. 1. c. 2. sect. 14.* but of a house with the appurtenances no land passes. *Pl. Com. 85. 6.*

If one that leases at will does any act inconsistent with the continuance of the lease at will, it shall determine it from such time as the tenant at will takes notice of it. If the lessor says the lessee shall hold it no longer, the lessee (as soon as he knows of the words) may take advantage of them as a determination of the lease. *1 Vent. 247. Raym. 204. See after.*

It was resolved, that a lease for a year, upon no other consideration than reserving a pepper-corn, (if it be demanded) shall work as a bargain and sale, and so as to make the lessee capable of a release. 2 *Mod.* 249. 1 *Mod.* 162. 2 *Vent.* 35. 10 *Co. Sutton's Hospital's* case; and that the reservation made a sufficient consideration to raise an use, as by bargain and sale.

A lease for ninety-nine years, if two persons so long live, without saying [*or either of them*] determines upon the death of either. 2 *Vent.* 74. 5 *Co.* 9. 2 *Cro.* 378. *Dyer* 67. & 2 *Inst.* 225.

Where several lands, held part for life and part for years, are demised to *A.* for years, to hold from the time of the death, surrender, forfeiture, or determination of the estate and term aforesaid of the first lessees, and the estate in one of these parcels determines, the term granted to *A.* shall commence immediately in the said parcel, although the other estates are in being. *Saund.* 183.

If a lessee enters before his term commences, and continues in possession after, he is a disseisor all the time. 1 *Lev.* 46.

Upon a lease made to two for their lives, without impeachment of waste during the said lessees lives, it was held that this privilege would hold to the survivor; for it is reasonable to give the privilege as large a construction as the interest. *Anderson* 251.

Note; That if the lessor seal the lease, and not the lessee, yet it is good against the lessor as if both had sealed. *Noy's Max.* 57.

And if at any time there happen any variance between the indentures, it shall be taken as the deed

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deed of the lessor is, and the other shall be intended only the mistake of the writer, because the deed of lessor is the principal, and the other but only a counterpart. *Ibid.*

Deeds between parties, indented or not indented, are suable and releaseable by the parties, and not by strangers, although they are to the use of the strangers. 3 *Lev.* 138.

To plead a writing under a man's hand does not imply a deed. 3 *Lev.* 234.

If a man demise any lands or tenements to another by lease parol, the lessor ought to be seised of the lands or tenements which he so lets at the time of the lease parol made, or else he cannot maintain an action for his rent; for the lessee may plead that the lessor had nothing in the premises at the time of the lease made, and then is barred of his action: But if the lease be made by deed indented, then the lessee cannot plead this plea. *Lit. Ten. l. 1.*

If a man lets lands to another by lease, to hold the same at the will of the lessee; the law intends it to be at the will of the lessor also, and he may put the lessee out when he pleases; likewise if it be let at the will of the lessor, it is intended at the lessee's will also, for the lessor cannot force him to stay longer than he pleases. *Coke 1 Par. Inst. 55.*

A covenant made between landlord and tenant, that the tenant shall have a new lease upon the surrender up of his old lease; and afterwards the lessor makes a lease by fine for more years to a third person; in this case the lessor hath broke his covenant, although the lessee did not surrender; which

which by the words of the covenant ought to have been the first act, because the lessor, by letting the lease to a stranger, did disable himself either to take the surrender, or make the new lease. *Noy's Maxims, p. 13.*

Rent in arrear upon a lease for years goeth to the executors of the lessor, if he die. As if *John Doe* make a lease for years to *Richard Roe*, and the lessee covenanteth and granteth to pay unto the lessor his heirs and assigns, the sum of twenty pounds yearly during the term in the lease granted; in this case, if the lessor die, his executors shall have the rent in arrear, and not his heirs, because rent once due is part of the personalty.

Where a man covenants for himself and his assigns to permit, &c. if a breach be laid in the assigns, this covenant shall only relate to the assigns after the deed was made, and not before. *2 Vent. 278.*

Where lessee covenanted to build three houses upon the premises, and keep them in repair, he built five, and let one of them fall to decay; and it was adjudged that the covenant extended to that also. *2 Vent. 128. 3 Lev. 265.*

If a man covenants not to inclose, inclosure with gaps is a breach of the covenant. *Lit. Rep. 267.*

A later covenant by a second indenture cannot be pleaded in bar to the former, but the defendant must bring his action on the last indenture if he will help himself. *2 Vent. 218.*

If a man by deed grants a watercourse and stops it, the grantee shall have an action of covenant. *1 Saund. 322.*

If

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If a lease be made of an house and *Esfovers*, and the lessor destroy all the trees, the lessee may have an action of covenant. *Id. Ibid.*

Also if a lease be made of an house, and a piece of land (except the ground on which the pump stands) with the use of the said pump, the lessee may repair the pump, but no action of covenant lies against the lessor for not repairing it. *Ibid.*

When the use of a thing is granted, all is granted by which the grantee may have and enjoy such use. *Id.*

Although the breach of the testator's covenant is by the proper default of his executors, yet the judgment ought to be of the goods of the testator. *Idem* 112.

An action of covenant does not lie against a grantor for not repairing the thing granted. *1 Saund.* 322.

An assignee of a reversion may maintain covenant for repairs against the lessee, although assignees are not named in the covenant in the lease. *1 Lev.* 109. Covenant lies for a grantee of a reversion against the lessee after assignment of his term. *3 Lev.* 233.

Any words in a deed purporting an agreement to pay money, &c. amount to a covenant to do it. *1 Lev.* 48.

A proviso to pay amounts to a covenant to pay. *Idem* 151.

Covenant that he or his under-tenant should not dig, &c. and *B.* who held of *J.* who held of *H.* who held of *E.* did dig, &c. Held *B.* was under-tenant of *E.* *1 Lev.* 144.

A lessee covenants with the lessor, his executors and administrators, to repair; this shall

go with the land, and the heir may sue upon it. 2 *Lev.* 92.

In expounding all deeds, the words and the intent of the parties ought to be observed, especially in covenants. *Lit. Rep.* 209. 3 *Lev.* 100.

If there be a covenant in a lease, that if the rent be behind and unpaid for such a time, (that is, by the space of so many days after the usual day or time of payment in the lease appointed and reserved) then the lease to be void; in this case, although the lessor do accept of the rent after such failure made, here no such acceptance of the rent can make the lease good. *Dyer, f.* 51.

If a tenant take houses and lands by lease for years, and covenants with the lessor to support, uphold, and maintain the houses during this term, and to leave the houses and lands in as good repair, plight and estate, as he found them, in this case, if it should happen that the houses be casually burned by fire or lightning, or blown down by a tempest, or destroyed by any other accident, if the lessee do not repair and build them again, and leave them as good as he found them, the lessor may sue his said covenant against him at the end of his lease; but if a tenant make waste in cutting of wood or timber contrary to the proviso's, exceptions or covenants in this lease, for such a breach the landlord may bring his action of covenant, before the end of the term. *Noy's Max. p.* 16. *See after.*

A man takes a lease for years, and covenants and grants to and with the lessor, for him and his executors, to repair the houses as often as need requires; and afterwards the lessee assigns over the lease to another, and the assignee suffers the houses

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houses to decay for want of repairs; in this case the lessor may bring an action of covenant against the assignee, although he be not named in the covenant. *Hugh's Grand Abridgment*, 1 Par. p. 492. c. 19.

A landlord lets a lease, and covenants with his tenant that he shall have sufficient hedge-boot, to be assigned him by the landlord or his bailiff; in this case the tenant may not take hedge-boot without assignment. *Co. 1 Par. Inst. f. 41.*

If a man by indenture take a lease of a house that is old, ruinous, or wanteth repairs, and covenants with the lessor to leave this house at the end or expiration of the lease in good repair, in this case he is bound to leave this house in good repair; but if he do not covenant to do it, the law then will not oblige him to do it. *Perkins Tit. Conditions, 738.*

How houses are to be now built within the bills of mortality, according to the late act of parliament, see at the latter end of this treatise.

If a man by indenture takes a lease for years of a wood, and covenants with the lessor to leave his wood in as good a condition as it was at the time of the lease made, and during the term the wood is destroyed and blown down by violent winds and tempests, in this case the landlord can have no action against the tenant for not performing of this covenant, because it is impossible for him to perform it; and the law enforceth no impossibilities: Otherwise it is if he take a house, and that be blown down. *Hugh's Grand Abr. p. 499.*

Touching bonds for performance of covenants, if a man takes a lease for years, rendering rent,

and enter into bond to the lessor to perform all covenants and agreements contained and comprized in the lease, if he fail in payment of rent, the bond is forfeited, for the payment of rent is an agreement. *Goldsbrough, p. 16.*

If a man be bound in a bond to repair the houses of the obligee as often as need shall require during a certain time, and afterwards the houses want reparation, in this case, although the *obligor* doth not know that they want reparations, yet he is bound to take notice of it at his peril, for ignorance will be no excuse in this case, because he hath bound himself to it. *Doct. and Stud. lib. 2. c. 47.*

But if the condition had been, That he should repair such houses as he to whom he was bound should assign, and after he assigned certain houses to be repaired, but he that is bound hath no knowledge of that assignment, this ignorance shall excuse him in the law, because he hath not bound himself to any reparation in certain, but such as the *obligee* will assign; and if he assign none, the *obligor* is bound to none: And therefore, because he that should make the assignment is privy to the deed, he is bound to give notice of his own assignment; but if the assignment had been appointed to have been made to a stranger, then the *obligor* had been bound to have taken notice thereof at his peril. *See more Observations on Covenants in Leases, &c. at the End of this Treatise, Chap. X.*

If a man makes a lease for years with warranty, yet this is not a warranty in the law, but a covenant, because the lease is but a chattel; and if the lessee be ousted, he may bring his action of covenant against the lessor.

If

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If *A.* be seised of twenty acres of land, and let the same to be *B.* by lease for life or years, and *A.* reserves to himself five shillings rent, payable at *Christmas*, and *B.* binds himself to *A.* in a bond of one hundred pounds to pay the rent reserved upon the lease justly, according to the law; if before any day of payment *A.* puts *B.* out of any part of the land, and he doth occupy the residue for the whole term, and will not pay any rent, yet the bond is not forfeited; for by putting the tenant out of parcel of the land, the whole rent is in suspense, for it arose from the lessor's own wrong: But if one day of payment be past before the *ouster*, then the tenant must pay the rent, or else he forfeits his bond.

But if a stranger, who hath no right in the lands, do put the lessee for years out of the same land before any day of payment, and keep possession thereof until the day of payment be past, in this case the tenant ought to pay his rent at the day whereon it is appointed to be paid, or else he forfeits his bond, for he has his remedy at law against the wrong doer.

If three *copartners* be seised of a manor, and one of them, without consent of the other two, lets a lease of the whole manor in her own name unto *J. D.* for five years, paying ten pounds yearly at *Christmas* unto the lessor and her heirs, and *J. D.* enters into bond in five pounds to pay the rent accordingly, and before any day of payment is come, the other two *copartners*, who agreed not to the letting of the lease, do put the lessee out of the whole manor, and keep the possession until a day of payment is come, here the lessee ought to pay a third part of the rent reserved to his lessor, or otherwise he forfeits his bond, because the other two *copartners*

who ejected him out, have right but in two parts of the manor. *Perkins* 828.

- A man makes a lease to three persons upon this condition, that neither they nor any one of them shall alien, set, or let that lease to any other without licence first obtained from the landlord: Now if the landlord do give licence to any one of them to let or alien, then the other two may alien without licence; for the condition being determined to one, is determined to all. *Hughe's Grand Abr. 1 Part, p. 428. See after.*

- In the same nature is a release where many persons commit a trespass, if he against whom the trespass is committed do release one of the trespassers, that release is as effectual to all the rest, as if they had been particularly named therein.

- If a landlord do enter for a condition broken, or the tenant surrender up his lease, or his term be expired, yet the landlord may have an action of debt for the arrears of rent, if any be. *Noy's Max. p. 72.*

- If a man lets a lease of lands upon a special condition, that is, that the lessee shall not alien the same to such a man, or such a man, then the condition shall be taken according to the words; and notwithstanding that condition, they may be alienated to any other, but to them to whom it is expressly prohibited that the lands should not be alienated unto: And if the lands in that case be alienated to one that is not excepted in the condition, then he may alien the land to him that is first excepted, without breaking of the condition; for conditions are taken strictly in the law, and without equity. *105 Doctor and Student, l. 2. c. 35.*

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As, if a lease be made to *A.* upon condition that he shall not let or alien the same to *B.* if the tenant alien to *C.* and he alien it to *B.* the condition is not broken.

If a man be seised of lands in fee, and let the same by indenture of lease to a stranger, paying five pounds rent *per Ann.* with a condition, That if the lessee will hold over ten years to him and his heirs, that then he shall pay twenty pounds *per Ann.* and the indenture is executed by livery and seisin to the lessee; in this case the lessor shall have an action of debt for the rent in arrear within the ten years, which proveth the freehold and the fee are not in the lessee before the ten years expired: But after the expiration of the ten years, if the lessee doth continue the possession of the same land, and doth occupy the same by virtue of the indenture, then he hath fee, and shall pay the twenty pounds as the rent-seck. *Perkins 710. c. 11.*

But if a man seised in lands doth let the same land by lease for term of life, yielding to him a rose for the first six years, and if he will hold the land over the six years, then to pay three marks *per Ann.* here the freehold is immediately in the lessee. *Co. 1 Par. Inst. f. 218. b.*

A man makes a lease for years with this condition, That if the lessor do alien the reversion within the term granted by the lessee, then the lessee shall have the fee, and the lessor doth alien the reversion in fee by fine to a stranger; in this case the lessee shall not have a fee, for the freehold and the fee are lawfully in the *conusee* before the lessee can take it by condition: But if the lessor had granted the lands to a stranger by deed only,

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then the lessee should have had fee by the condition. *Perkins* 729, 739.

A lease made by a man before entry, after a recovery, is void. 2 *Lord Raym.* 853. 7 *Mod.* 51. *Salk.* 2.

Demise by parol of an office is void. *Ib.*

If a man have a lease for years, and demise or grant the same upon condition, and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead. *Perkins* 833.

If a man make a lease for years upon a condition, That the rent shall be paid at *Christmas*, and before that time comes the lessor give a general release to the lessee of all actions and demands, this release doth not acquit the lessee of the rent, but the lessor may sue for it, because it was neither due, nor to be paid at the time of the release made; and it is a thing not merely in action, because it may be granted over. *Lit. l.* 3. c. 8.

If a landlord lets a lease for years to two tenants to hold jointly, with a condition, That if the lessees die before the end of the term, the lease shall be void; now these lessees make division, and one of them aliens his part, and dies; in this case the lessor cannot enter upon the part of him that died, but the alienee shall enjoy his half-part during the life of the surviving lessee. *Dyer*, p. 67.

A. as attorney to *B.* lets *B.*'s house for a term of years in his own name; as it was not made in the name of *B.* whose house it appeared to be, and that the plaintiff only made it as attorney, there could be no estoppel, the lease itself was void, and the covenant to pay it accordingly, and the plaintiff

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tiff could not maintain the action. 2 *Lord Raym.* 1419. *Str.* 705. 8 *Mod.* 116. *S. P.*

A lease made for years upon condition, That if the lessee demise the premises, or any part thereof, other than for a year, to any person or persons, then the lessor and his heirs to re-enter; the lessee afterwards devises this lease to his son by his will; this is a breach of the condition.

If a man of his meer motion give lands to *H.* *H.* and to his heirs, by indenture, upon condition, That he shall yearly at a certain day pay unto *John at Style*, out of the same land, a certain rent; and if he do not pay the rent, that then it shall be lawful to *John at Style* to enter; in this case, if the rent be not paid to *John at Style*, the said *J. S.* may not enter into the lands by the law, though the words of the indenture be, That he shall enter; for there is an ancient maxim in the law, That no man shall take advantage in a condition, but he that is party or privy to the condition; and this man is not party nor privy, and therefore he shall take no advantage of it. *Doctor and Student, lib. 2. c. 20. f. 93.*

In many cases the intent of the party is void to all intents, if it be not grounded according to the law.

As, if a man make a lease to another for term of life, and after, of his meer motion, he confirmeth his estate for term of life to remain after his death to another and his heirs; in this case that remainder is void in law; for by the law there can no remainder depend upon any estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confirmation enlarg-

ed not his estate, nor gave him any new estate. But if a lease be made to a man for the term of another man's life, and after the lessor, only of his mere motion, confirmeth the land to the lessee for term of his own life, the remainder over in fee, this is a good remainder over in fee. *Doctor and Student*, c. 20. f. 94. because it gave the tenant a new and greater estate than he had before, and consequently the remainder might be supported by it.

No grant can be made but to him that is party to the deed, except it be by way of remainder: And therefore, if a man make a lease for term of life, and afterwards the lessor grant to a stranger, that the tenant for term of life shall have the land to him in his heirs, that grant is void, if it be made only of his mere motion without recompence. *Doctor and Student*, l. 2. c. 20. p. 94.

Likewise if a man make a lease for term of life, and after grants the reversion to one for term of life, the remainder over in fee, and the tenant attorneth to him that hath the estate for term of life only, intending that he should have advantage of the grant; his intent is void, and both shall take advantage thereof, and the attornment shall be taken good according to the grant. *Ibid.* See after.

If a tenant for the term of another man's life dies, living the other man, he that doth first enter upon the estate after his death, shall be tenant for the other man's life, and shall be liable to the payment of the rent reserved. *Co. Lit.* 41.

In the case of occupancy (which ariseth by conveyance) as,

Where lands are conveyed to *A.* for the life of *B.* and *A.* dies without making any estate or assignment

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signment thereof, here whosoever first entereth after the death of *A.* getteth property in that land during the life of *B.* for the land cannot revert to him that leased to *A.* till *B.* die; and to the heir of *A.* it cannot go, for it is not an estate of inheritance, nor descendible to the heir without special words; and as for the executors of *A.* they cannot have it, for that is not an estate testamentary.

But *Co. Lit. f. 41.* shews how this occupancy may be prevented, by adding these words in the grant, *To have and to hold to A. and his heirs,* during the life of *B.* for then it is descendible to the heir.

How also it may otherwise be prevented by assigning the lease for life over to friends and their heirs, in trust during the life of *B.* But the statute * 29 *Car. 2. c. 23.* hath provided, That the lessee or grantee may devise such estate for another's life, by his will, in presence of three or more witnesses.

And if he devise it not, and his heir become occupant, it shall be chargeable in his hands as assets by descent, as in case of lands by fee-simple.

And in case there be no special occupant, then it shall go to the executors or administrators of the party that had the grant, and shall be assets. See the *Statute.*

And some have held, That an executor *de son Tort* is as much within this act to be charged as a rightful executor; and that the entering into land and leasing it, is enough to make him an executor *de son Tort.* *Q. et Vide 5 Co. 33, &c.*

* Perpetuated by Stat. 1 Jac. 2. c. 17. s. 5.

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If a tenant hath a lease for twenty years of lands and tenements, and grant the same lands for part of his term to a stranger, reserving to himself forty shillings rent; in this case he may distrain for the rent reserved, or have an action of debt at his pleasure, because by common intendment he is to have the same land after the years determined, because he hath granted but parcel of the years, so that the remainder remains in him. *Perkins* 693.

If rent be granted to a man, he may grant it away to another before he is seised thereof. *Idem* 108.

If a man and his wife be ejected of a term in the right of his wife, and the husband bring an *ejectione firmæ* in his own name, and do recover, and die; in this case his executors shall have it, and not the wife, because the recovery in his own name did vest the term in himself. *Co. Lit.* 46.

If a man be possessed of a term of forty years in right of his wife, and make a lease for twenty years reserving rent, and die; here the executors of the husband shall have the rent for that term, but the wife shall have the remainder of the term when the twenty years are out: But if he had granted the whole term, she could have had nothing. *Co. Ibid.*

A release made to a tenant for term of years before his entry, is void; but a release of the rent before entry is good. *Co. Lit.* 270.

If a man makes a general release of all demands, it doth not release rent due upon a lease for years. 2 *Lev.* 370.

The tenant may grant away his interest to another before entry; and although the lessor do die before

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before entry, yet the tenant may enter into the lands; and if the lessee die before he enter, his executors or administrators may enter; and if a lease be to two, and one of them die before entry, the other may enter by survivorship; and a lessor cannot grant away a reversion by the name of a reversion, before the entry of the tenant.

If a man grant to a tenant for years, that he shall have so many *efflovers* as shall serve to repair his house, or that he shall burn within his house, or such like, during the term, this is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh. *Co. Lit. 41.*

If two tenants in common do grant a rent of ten shillings, this is several, and they shall be charged with twenty shillings rent; but if they make a lease, and reserve ten shillings rent, they shall have no more but only ten shillings between them. *Co. Lit. 197.*

Lease by tenants in common cannot be pleaded as a joint-lease. *1 Lord Raym. 404.* So said by *Blencowe, arguendo.*

If two *copartners* make a lease reserving rent, they shall have this rent in common, as they have the reversion; but if afterwards they grant the reversion, excepting the rent, then they shall be joint-tenants of the rent, for in the first case it is a rent-service following the nature of the reversion, in the other it becomes a rent-*seck*.

If a man leases lands for years reserving rent, and a stranger doth recover part of the land, then the rent shall be apportioned, *viz.* divided, and the tenant shall pay, having respect to that which is recovered, and to that which still doth remain
in

in his hands according to the value, to each party proportionably. *Dyer*, 56 & 82. *See after*.

And for a full understanding of apportionment of rent, see *D'Anvers's Gen. Abr. f. 504, 505, &c. Tit. Apportionment*.

If a man make a lease, excepting a close and wood, the law giveth him a way to come to it.

If a tenant for years do take a new lease for more years, this a surrender in law of the old lease. *Watt and Maidwell's case, Hil. 3 Car. R. 1302. B. R. Perkins 117. Hutt. Rep. 104.*

A lessee for years cannot surrender before his term begin, neither can he surrender part of his lease, but he may grant part of it. *Noy's Max. 74. Vide antea.*

If the reversioner makes a lease for years of his reversion, the lessee in possession, though he has a greater term than the lessee of the reversion has, yet he may surrender to the lessee of the reversion. *Lord Raym. 402.*

If a tenant for life or years remove his goods out of the house and land, by reason of the greatness of the rent, or for some other cause, and the lessor do enter into the house and lands, this is no surrender of the lessee. *Idem, p. 72.*

If a tenant for years assign over his term and die, his executors shall not be charged for rent due after his death.

And if the executors and administrators of a lessee for years do assign over their right in the lease, there lieth no action of debt against them for rent after such an assignment by them made. But *vide contra, antea, & 2 Vent. 209.*

If a tenant for years assign his lease to another, the landlord may charge which of them he will ;
but

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but if he once accept of the rent from the assignee, knowing of the assignment, he cannot afterwards bring an action of debt against the lessee for rent due after the assignment. *Hern's Law of Conv.* p. 110.

For, by acceptance of rent by the lessor from the assignee, the privity of the contract is determined, and the action of debt against the first lessee is gone. 1 *Saund.* 240, 241.

But after such acceptance the lessor or his assignee may maintain an action of covenant against the first lessee upon his covenant for payment of rent. *Idem* 240. *Vide* 2 *Saund.* 302.

A lessor may refuse to accept of an assignee to be his tenant at one time, and yet may accept of him afterwards when he pleases. 2 *Saund.* 282. And so may have his election to sue the lessee or his assignee for the rent: but after acceptance from the assignee it is otherwise, as above.

If a lessor grant away the reversion after the assignment of the lessee, in this case the grantee cannot have an action of debt against the lessee for the rent, because there is no privity between them. *Poph.* 55.

Ruled by *Holt* chief justice, that if *A.* possessed of a term for an hundred years, grants the land, *habendum* for forty years, to begin after his death, it is a good new lease, and a man possessed of a term for twenty years may grant the land for nineteen years, to commence after his death, and it will be good for so many of the twenty years as shall be unexpired at the time of his death. *Rord Raym.* 737.

It is noted, That a reversion of a term is not assignable without deed and attornment. 3 *Lev.* 155.
By

By the statute 4 & 5 *An.* for amendment of the law, it is enacted, " That all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estate any such reversions or remainders shall or may be expectant or depending, as if their attornment had been had and made.

" Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee."

If a lease for years be made to a man without any consideration, the lessee shall be seised to his own use. *Perkins* 537.

If a man make a lease of lands to another, and to his heirs, for the term of twenty years, intending that if the lessee die within the term, that then his heirs should enjoy the lands during the term; in this case his intent is void; and if the lessee die, his executors, and not his heirs, shall enjoy the term; for by the law of the land all chattels shall go to the executor, and not to the heir.

Doctor and Student, l. 1. c. 24.

If a man lets a house with the appurtenances, no land passes thereby; but if it be with all lands thereunto belonging, here the lands used with the houses do pass. *Hern's L. of Conv.* p. 104.

If

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If a man take a lease of his own land by indenture, he is then concluded to say, That the lessor had nothing in the land at the time of the making of the said lease; but after the lease is out, the *estoppel* is removed. *Terms de ley, Estoppel, Co. 1 Par. Inst. f. 47.*

If two persons be joint-tenants of a lease for years, and one bid the other go out of the house, and he goeth so out, he that goeth out may have an *ejectione firmæ* against the other, as well as if he had ejected him out by force. *Beverlie's case, 24 Car. Clayton's Rep. p. 111.*

One who had power to lease for ten years made a lease for twenty; decreed in equity that it was a good lease for ten years. *Perry v. Bowen, 15 Car. 2. Chancery Cases 1. p. 23.*

A lease was made to one who assigned it to another, the lessor received the rent of the assignee, which became due in his time, but had no particular notice given him of the assignment: It was adjudged in this case, that no special notice need be given by the lessee of the assignment, but that the acceptance of the rent of the assignee was a sufficient notice, and he could not resort to the first lessee for his rent afterwards. *Mich. 11 Jac. B. R. Marsh and Brace's case, 2 Bulst. 151.*

Where one lets his land for life or years in which are coal-mines that are open, the lessee may dig them; but the lessee cannot make new mines where none are open before. *Shepherd's Abr. 1224.*

The plaintiff married the defendant *Wallis* (who was before married to another woman); *Wallis* made a lease of her land, and received the rent of the tenants: The former marriage being
dis-

discovered, the plaintiff brought an *indebitatus assumpsit* against *Wallis* for money received to her use, and had a verdict: And the court held, That *Wallis* being visibly her husband, the tenant was discharged; at least that the recovery against *Wallis* in this action would discharge the tenant. *Haffer v. Wallis, Hil. 6 Anna, B. R.*

Lease of a house, excepting two rooms and a free passage to them. The lessee assigns, and the assignee disturbed the lessor in his passage thereto; whereupon the lessor brought his action. *Per Cur'*: The action lies; but if the disturbance had been in the rooms excepted, no action of covenant would have lain, for they were not demised; but where the lessee agrees to let the lessor have any thing out of the demised premises, as a way, common, &c. In such case covenant lies for the disturbance. *Cole's case, Hil. 3 W. & M. B. R. Salk. 196.*

Lessee covenanted for him and his assigns to rebuild and finish the house within such a time, and after the time expired, the lessee assigned over the premises, the house not being built and finished. *Per Holt*, chief justice: The covenant will not bind the assignee, because it was broke before the assignment; *aliter* if it had been broke after, and the lessee had assigned before the time expired. *Grescot v. Green, Pasch. 12 W. 3. B. R. Salk. 199.*

Where a lessee for years sets up any thing for the convenience of his trade, such as stalls, coppers, &c. he may remove them at any time during his term, and they are seisable on a *Fi. Fa.* But what he does to compleat or beautify the house, as laying of hearths, setting up chimney-pieces,

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pieces, &c. he cannot remove them, neither can they be taken in execution. *Pool's case, Mich: 2 Annæ, Salk. 368.* If the lessee in the room of wooden or stone chimney-pieces, &c. puts up marble ones, he may remove them before the end of the term, putting up such or as good as were there before.

And the law seemeth now not to be held so strict as formerly, and there if hangings, tapestry and iron backs to chimnies can be taken away without prejudice to the fabrick of the house, they may, 2 *Str. 1141.* so tables, although fastened to the floor, furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise. 2 *Burn's Eccles. Law. 648.*

The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule, as between landlord and tenant, or between tenant for life, or tail, and the reversioner. *Tri. at Ni. Pri. 4to. p. 33.*

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But what he does to complete or beautify the house, as laying of stairs, joining of chimneys, &c. may remove them at any time during his term, and they are returnable at the end of the term.

C H A P. III.

Of Payment of Rent; Acceptance and Extinguishment thereof; Demands, Entries, Dates, Continuance, Limitations, and Determinations of Leases.

IT ought to be a principal care of a tenant, above all things, to provide his rent at the time of payment, whereby he may avoid much *slavery* and *knavery* of cruel biting landlords.

Land may be let by the year at so much as it is worth, and in the pleading aver it to be worth so much. 2 *Lord Raym.* 1160. *Arguendo.*

If a tenant be to pay his rent to his landlord at our *Lady-day* and *Michaelmas*, or within fourteen or fifteen days after either of the said feasts; in this case he is not bound to pay his rent until the last day limited for payment, for that is the legal day of payment, and the other before voluntary.

And if there be a clause, that if the rent be behind by the space of fifteen days (more or less) after any of the said days of payment, then the lease to be void; in this case, if the time before limited be fifteen days, then the tenant shall have thirty days after any of the said feasts to save his lease; but if the clause in the lease be, That if the rent be behind for the space of fifteen days next after either of the said *feast days* of payment, here the

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the tenant hath but fifteen days only allowed to him : And so the diversity is to be noted in this case in the words of a lease, which with a very little and scarce observable alteration makes so much advantage for the tenant. *Hern's Law Conv.* p. 23. 10 *Rep.* 227. *Co. Lit.* 202.

Where there are special days of payment limited upon the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum* : But where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the *habendum*. 2 *Lord Raym.* 820. *Tomkins v. Pincent*.

If a man take a lease for years to pay his rent at our *Lady-day* and *Michaelmas*, or within fifteen days after either of the said feasts, and the landlord die after either of the said feasts, and before the fifteen days be out, the heir in this case shall have the rent then, for the first day is but voluntary, and the legal day of payment is at the end of the fifteen days : And if the tenant before that day pay the rent, such payment is voluntary, and not compulsory ; but if payment be in the morning, and the landlord die at noon, it is good to give seisin : And though this payment be voluntary, yet it is satisfactory against the heir. *Hare and Savil's case*, *M. 7 Jac. in C. B.* *Brownl. Rep.* 2 *Par.* 273. *Hern*, p. 22, 23.

If a tenant for years be to pay his rent at *Michaelmas*, and to perform other covenants ; and if he be bound in any obligation to pay his rent precisely at the day, he must in this case seek out his landlord to pay him ; but if his obligation be only
to

to perform the covenant in the lease, he may then tender his rent upon the land, (if no other place be by agreement appointed for the payment thereof) and it is sufficient, for the payment is of the nature of the rent reserved. *Manly and Jennings's case, Pasc. 10 Jac. in C. B. Brownl. Rep. 2 Par. p. 276. Noy's Max. p. 80.*

Note ; A man is not bound to pay an annuity without an acquittance ; but a rent-service or rent-charge he is : And therefore in an action of debt brought against a man for rent due upon an indenture of demise of lands, he may plead payment without an acquittance. *Perk. Sect. 780. Pract. Reg. 495.*

Also, if he that hath rent-service or rent-charge accepts the rent due at the last day, and gives an acquittance for it, all the arrearages of rent due before are hereby discharged. *Co. Lit. 373. a. Hern's Con. 40. 3 Co. 66.*

Payment of money before the day appointed, is in law payment at the day. *Pract. Reg. 495.*

When one is to pay rent at a certain day, he hath all that day till night to pay it ; but if it be a great sum, he must then have it in readiness so long before sun-set, as they that are to receive it may see to tell it, for they are not bound to tell it by candle-light. *See after.*

If a parson lets his glebe-lands to a layman, the tenant shall pay the parson tithe of that land besides the rent ; for the tithe are of common right.

If a man let out by lease a stock of cattle or other goods, (as it is very usual now-a-days, to lease out silk stocking-frames to the weavers) and the rent to be paid at several days ; if the rent in
this

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this case be in arrear, the lessor cannot bring an action against the tenant or occupier thereof until all the days be expired : In like manner as it is in an obligation with condition for several payments, because these are personal contracts. But it is otherwise in case of a lease for years, which is a real contract ; for there the landlord may have an action of debt against the tenant after every day of payment, if default be made, or he may distrain at his election. *Co. Lit.* 47, & 292.

If there be two joint-tenants, and they make a lease for years by parol or deed poll, and reserve rent to one of them, this shall enure to them both : But if it be by deed indented, it shall enure to him alone by way of conclusion. *Co. Lit.* 47. 8 *Rep.* 70, 71.

If an heir let a lease to a tenant for life, and reserves a rent, against whom the mother of the heir recovers her dower, and dieth, the tenant shall have the land again for his life, and the rent is revived. *Co. Lit.* 42.

If the successor of a parson or vicar accept the rent of a lease for years made by his predecessors, yet this acceptance is worth nothing, for the lease is void by death ; but of a lease for life it is otherwise. *Pennant's case*, 3 *Rep.* 65, 66.

But if a bishop accept the rent upon a lease for years, he shall never avoid it ; for it was but voidable only, and his acceptance hath now confirmed it.

If a man hath lands in the right of his wife, and he and his wife let these lands for years, reserving a rent, and afterwards the husband dies, and she before any day of payment takes another husband, who

who accepts the rent, and dies, by this acceptance the lease is affirmed.

In like manner, if a man and his wife let the lands of his wife for years, rendering rent, and the husband dies; if the wife accept the rent it is a good lease. *Terms of the Law, Acceptance.*

But if a tenant for life lease lands for years and dies, the lease is void, and the rent which is reserved upon the lease is determined. And altho' he in remainder do accept the rent, yet his acceptance will not make it good; for when it is once void by death, no acceptance after will make it good.

So likewise if a tenant in dower lease for years and die, the lease is void, and the acceptance of the rent by the heir will not make it good again.

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land; but if it be a frank-tenement, it shall enure to the whole absolutely. *Noy's Max. p. 78.*

Observe this difference between a lease for life and a lease for years: In case of a lease for life, though the conclusion of the condition be, That it will be void, yet acceptance of the rent due after the breach doth affirm it, and make it good again. *Pennant's case, 38 El. Co. 3 lib.*

If a parson let a lease for years of his glebe-land, if it be confirmed by patron and ordinary, it shall bind the successor, or else not. *Co. Lit. 300.*

If a lease be made to a man for the term of another man's life, and afterwards the lessor only of his meer motion confirmeth the land to his lessee for term of his own life, the remainder over in fee;
this

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this is a good remainder in the law. *Doctor and Student*, l. 2. c. 20. f. 93.

If a man lets land for life or years, reserving rent, and do enter into any part thereof and take the profit, the whole rent is thereby extinguished, and shall be suspended during his holding thereof. *Leonard's Rep.* 110. *Godard's case*, Mich. 34 El. C. B. *Owen's Rep.* f. 10. *Hern's Law Corru.* p. 118.

In what case there shall be a revivor of rent, and in what not, *vide Lit. Rep.* 58.

In what case there shall be a suspension of rent, *Ibid.* *Vide Lord Raym.* 369. 2 *Lord Raym.* 1477. *Stra.* 763.

Where there shall be no apportionment of rent, *Id.* 61. And how the word *annuatim*, or yearly, shall be taken.

Note, That where two closes are in the same possession, the duty of fencing is extinguished, and shall not revive, though the closes come after into several hands. 1 *Vent.* 97. *Dyer* 295. *Poph.* 172. 1 *Cro. Baber and Bereman's case.*

Debt does not lie for a rent reserved on a lease for life upon 32 *H. 8. c.* 37. without shewing that the estate is determined. 2 *Lord Raym.* 1056.

If a lessee assigns over his term, reserving rent, it will be extinguished by releasing all demands. 1 *Vent.* 314. 1 *Mod.* 99.

But it was said, That a rent incident to a reversion would not be barred by such release. 1 *Vent.* 314. 1 *Sid.* 141.

Also it is said, That a man cannot release a debt by his will. 1 *Vent.* 39.

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Note,

Note, That where a fine is levied to a lessee for years, with an intent that he should suffer a recovery, his term is not drowned. 1 *Vent.* 195.

But if tenant for life, with power to make a jointure, suffers a recovery, the power is extinguished. *Id.* 226.

If the tenant come to the landlord at any place upon the ground at the day of payment, and tender his rent to the landlord, it is good enough, and shall save the condition; and the landlord is bound to receive it, although it were not at the most *notorious* place, nor last instant of the day; for he may tender his rent at any time of the day, although the last instant be the legal time of payment. *Co. Lit.* 202.

But observe, by the way, That a tender of rent must be of the whole rent, without deduction of taxes or assessments, or any other charges; for stoppage is no payment in the law. *Trin.* 23 *Car.* in *B. R. Pract. Reg.* p. 662.

But *note*, That by the late acts for granting aids by land-tax, &c. the tenant is at liberty to deduct the land-tax, and tender the remainder, and this by the courts in *Westminster* is held to be a good tender.

If a man lets lands by lease for years to another, reserving rent of the lands to be paid at *Michaelmas* and our *Lady-day* or within fifteen days after, and for default of payment to re-enter; in this case it is sufficient and lawful for the tenant to tender his rent the last hour of the last day, if the money can be told in that time before it be dark; and so it is sufficient for the landlord to demand it the same hour. *Co. Lit.* 202.

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Although the time of sun-setting is the time appointed by the law to demand rent, to take advantage of a condition of re-entry, and of tendering rent to save a re-entry, and of tendering rent to save a forfeiture, yet it is not due till midnight ; for a man demands till sun-set, yet if after sun-set, and before midnight he dies, his heirs shall have the rent, and not the executors ; which proves the rent is not due until the last minute of the natural day. *Vide 1 Saund. 287.*

A man seised in fee ought to reserve the rent upon a lease to himself and his heirs ; for that it appears, if a man seised in fee makes a lease for years, reserving rent to himself and his assigns, this rent is extinct after the lessor's death, because it was not reserved to the lessor and his heirs.

Lease by a tenant in fee, and rent reserved to the lessor, his executors, administrators and assigns, the words *executors and administrators* are void. *1 Vent. 162.*

So if a man seised in fee lease one acre of land, reserving 10s. rent to him and his heirs ; and also lease another acre, reserving other 10s. rent to himself, without saying [and to his heirs] the heir shall not have the last rent, but it is extinct by the death of the lessor. *2 Saund. 268, 269.*

But if one seised in fee reserves a rent upon a lease for years *durante termino* to the lessor, his executors, administrators and assigns, and not to his heirs ; yet by a grant of the reversion from the lessor, the rent is well transferred to the assignee ; and in such case the rent being transferred to the assignee, the law transfers also to him the cove-

nant of the lessee for the payment of it as incident to the rent. 2 *Saund.* 369.

Vide the case of *Sacheverel* versus *Frogat*, 2 *Lev.* 13. where the rent was reserved to him, his executors and assigns, the heir brought an action; and upon a demurrer it was argued for the defendant, That the rent determined by the death of the lessor: But the chief justice said, that the rent being reserved to him, his executors and assigns, would continue and go to the heir, for the apparent intent that it should endure after his death; otherwise it could not go to the executors, and that without the *durante termino*. But that it is otherwise where the rent is reserved to him, or to him or his assigns; and after several arguments, judgment was given for the plaintiff.

Now if a man makes a lease for years, reserving rent generally, and does not say to whom, the law will make construction, that it shall be paid during the time, to them who have the reversion, and to whom from time to time it shall appertain. 2 *Saund.* 369.

Where a father is seised in fee, if he and his son and heir apparent, by indenture make a lease for years, to commence upon the death of the father, rendering rent to the son by name, although the son be heir to his father, he cannot have this rent as heir, because the rent was not reserved to the heir; and he cannot have it by the reservation of the lease, because he was a stranger to the land, and had nothing in it at the time of the lease made. 2 *Saund.* 370.

If the lessor, seised of a reversion in fee, demise the reversion expectant upon an estate for years to a stranger for life, reserving rent when the reversion

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sion shall happen; in such case he shall have no rent during the continuance of the term for years; for a reservation of rent shall be construed most strongly against the lessor himself. 2 *Saund.* 168, 169.

If a lease be made with this proviso, That in case of non-payment the landlord to re-enter; here, if the landlord distrain, he may not re-enter, but he may accept of the rent, and yet re-enter; but if he do receive the next rent again, then he cannot re-enter, for that establisheth the lease. Entry into an acre of land in the name of the whole, is a good entry, if the land do all lie in one county. *Co. Lit.* 211.

In a lease for years, if the lessee covenant, That if he or his executors or assigns do alien, that then the lessor shall re-enter, and afterwards he makes his wife executrix, and dies, and the widow marries again, and her second husband aliens; in this case the lessor may re-enter, because the second husband is assignee in the law.

If a man make a lease for term of years, yielding to him and to his heirs a certain rent, upon condition, That if the rent be behind and unpaid by the space of forty days after any of the days of payment, that then it shall be lawful to the lessor and his heirs to re-enter: And after the rent is behind forty days, and is demanded by the lessor, and is not paid, the lessor dieth, and his heir enters; in this case his entry is lawful; but if the lessor had died after the feast-day, and before the fortieth day, so that he had not demanded the rent, and his heir had demanded the rent at the fortieth day, and for non-payment

he re-enters ; in this case his re-entry is not lawful. *Doctor and Student*, l. 1. c. 20. f. 35.

If a lease be made to *H.* for one and forty years, if he live so long ; and if he die within the aforesaid term, that then the wife of the aforesaid *H.* shall have it for the residue of the said years, this limitation is void ; for if *H.* die the term ends, and his wife shall have nothing in it. *Dyer* 254.

If a man lets all his meadow in *D.* containing ten acres, if there be twenty acres of it, all passes in this case. *Dyer*, f. 80.

If lessee for years make a feoffment, the lessor being upon the land when livery was made, this is a good feoffment, the law adjudging the lessee in possession, and livery ought always to be given of the possession, and therefore he that hath the possession must make the livery. But if the lessor makes the livery himself, the lessee being upon the land, this livery is void, because the lessor cannot give possession when the lessee is there. *Cro. Eliz.* 321, 322.

It is said, one may give authority by parol (or word of mouth) unto another to take livery or seisin of lands for him, and that if such livery and seisin be taken accordingly, it is good. *Pract. Reg.* 398.

If a deed of feoffment be made of land, *habendum a die datus*, and the next day after the date of the deed the feoffee give livery and seisin of his land, this is a good livery and seisin ; but that if this livery and seisin were made by attorney, it is said it will operate nothing. *Vide Hob.* 314. *Pract. Reg.* 398.

A thing that is to take effect *a die dat'* is not to take effect until the next day after the deed bears date ; but where it is *habendum a dat'*, or a *confectione*

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tione indentura, there it commenceth presently.
Pract. Reg. 398.

Ejectione firme of a lease made by *Smith*, a prebend, to *Bole* (the defendant); upon a special verdict, the case was, The said prebend was usually let with the exception of all crab-trees, and such like trees, rendering rent 17*l.* per Annum. Upon 8 August 6 Jac. the prebend made a lease of the said prebendship, omitting the exception, *habendum a die consecutionis*, for three lives, rendering the antient rent, and made livery 9 Sept. 6 Jac. and whether this was a good lease to bind the successor by the statutes of 13 Eliz. and 32 Hen. 8. was the question. First, whether this lease *habendum a die consecutionis*, and livery made after, be good or not? Resolved, that it was; for the livery being made after the day, not working futurely, was good enough. Secondly, whether this exception of the trees, being in all former leases, and omitted in this lease, makes it void? Resolved, that it was void; for there being more let than there was antiently, the trees, and the profits of the trees, and the soil itself, is excepted by this exception, so as every successor cannot have the benefit of boughs and fruits yearly renewing; and the soil itself, whereupon they grow, is excepted. But by this new lease the trees and profits are let, and the soil itself; and so more being let than antiently, it is not within the Stat. 32 H. 8. and it is void by the Stat. of 13 Eliz. for it is not the antient rent, where there be more let than was before: Wherefore it was adjudged for the plaintiff. Hil. 15 Jac. 1.
Smith v. Bole, Cro. Jac. 458.

If a man make a lease for years, and afterwards make a deed of feoffment, and delivers seisin, if the lessee be upon part of the premises, and neither know nor assent to it, yet the livery is void; for though the lessor hath the freehold and inheritance in him, yet the possession is in the lessee; but if the lessee be absent, and hath neither wife, children or servants (though he hath cattle) upon the ground, the livery shall be good. *Co. Lit.* 48.

If a lease be made to hold from the day of the making, or from the day of the date, or from the date, the lease shall begin the day after it is delivered.

A lease beginning from henceforth shall be accounted from the day of the delivery, and from the making shall be taken inclusive from the day of the making. The day of the delivery must be taken inclusive, and is the first day of the term. If from the day of the date, or day of the making, then the day of the delivery shall be exclusive; *aliter* if from the date, and it is delivered the same day. 14 *Eliz. Dyer* 307.

If the *habendum* of a lease be for a term of one and twenty years, without mentioning when it shall begin, it shall then begin from the delivery. So if an indenture of lease bear date upon days impossible, as *Feb. 30.* or *March 40.* there being no such days in our account; in this case, if the term be limited to begin from the date, it shall take effect and beginning from the delivery, as if there had been no date at all. *Co. 1 Par. Inst. f. 6. Co. Lit. 46. Hern's L. Conv. 15, 131.*

Vide 1 Vent. Rep. 137. That a lease without
any

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any date specified, or an impossible date, as from 40 Septemb. shall commence presently.

So a lease made to begin from the end of the lease misrecited, shall commence presently. *1 Ven. 83. 1 Lev. Rep. 234.*

A prebendary made a lease for life to hold from the date, and livery made the same day; it was objected, that it ought to commence from the day of the date, and so livery given the same day was void: But the court at length held it good, and gave judgment for the defendant.

A lease is made to commence after the death of J. S. his son, without issue; J. S. hath issue and dies, and then the issue dies without issue, the lease commences; for issue being a word collective, whenever the issue fails the term commences.

If lands descend to an heir, he may make a lease thereof before his entry into the same. If a man makes a lease to-day to one for ten years, and to-morrow makes another lease of the same lands to another person for twenty years, this second lease shall be good after the first is expired, for so many years as remain therein to come. *Noy's Max. p. 67.*

If a man makes a lease to another for one and twenty years, and after another lease to commence from the end and expiration of the said term of years, and after the first lease is surrendered; in this case the second lease shall commence presently upon the surrender. *Co. Lit. 45.*

But if it had been made to commence from the end of the said one and twenty years, there, though there had been a surrender, yet it should not have commenced till the term had been out; so that by this you may observe, the law

Puts a distinction between a term of years and a time of years.

And by 3 *Lev.* 284. an estate vests immediately after a surrender made, before acceptance or agreement; but that it devests by refusal afterwards.

And so by 2 *Vent.* 199. noted, that it was said, That no surrender of an estate can be perfect without acceptance by the surrendree. *Thompson v. Leach.*

But that judgment was afterwards reversed in parliament; so that it appears that a surrender devesteth the estate immediately before express assent of the surrendree. *Idem* 203.

A lease made to commence after the end of another, and there is none, it shall commence presently.

If a man lets land to another, to hold till the lessee hath levied twenty pounds; this is a good lease, notwithstanding the incertainty.

Bracton saith, That every lease must have a certain beginning and ending; *Quia id certum est quod certum reddi potest.* Yet you see by the case before, this rule is contradicted, so that it holds not always, although in the generality it doth.

For if a man make a lease to another for so many years as *J. S.* shall name, although this be uncertain at the beginning, yet when *J. S.* hath named the years, it is then good for so many years as he names.

So likewise, if *A.* be seised of lands in fee, and do grant to *B.* that when he pays him twenty shillings, that then from that time he shall have and occupy the land for one and twenty years, and after *B.* pays unto *A.* the twenty shillings, this is
a good

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a good lease for one and twenty years from that time. 6 *Rep.* 34, 35. *Co. 1 Par. Inst. fo.* 45.

If a parson make a lease of his glebe for so many years as he shall be parson there, this is void, because of the uncertainty thereof; for the parson's time there terminates with his life, than which nothing is more uncertain.

If a lease be made for one hundred years, if *A.* and *B.* live so long, in this case, if either of them die, the lease is ended.

If an infant, who is seised of lands in socage, make a lease at his age of fifteen years, this is good, and shall bind him. *Co. Lit.* 45.

If a tenant in fee marry a wife, and make a lease of his lands for years, and after die, and the wife is thereof endowed, here she shall avoid the lease; but after her death it shall be in force again against the heir. *Co. Lit.* 46. This is meant of a beneficial lease, not of common leases or rack-rent, &c.

If a man have a term of years in the right of his wife, if she die, it remains to him; but if she survive him, it remains to her, and not to his executors, without he dispose of it in his life-time. 8 *Rep.* 49.

If a man licence another to enter and occupy his land, this is a good lease for years in law. *Brownl. 2 Part, p.* 250.

A lease for years, although it be never so long, cannot be intailed, because it is a chattel, which cannot be turned into an inheritance. *Style Pract. Reg. p.* 197.

If a man seised in fee-simple let a lease to another, to have and to hold the same lands for term of life, and do not mention whose life, it shall be

taken for the lessee's life, because the act of every one shall be taken most strongly against himself.

But if a tenant in tail let such lease without expressing whose life, it shall be taken for the life of the lessor, because the implication otherwise would make tenant in tail a wrong doer.

If a joint-tenant make a lease for years of his part, though the lessee never had possession, or though it be to begin at a day to come, and the joint-tenant that made it die before the day, yet the survivor shall be bound by the lease, for the lessee hath a present interest. *Co. Lit.* 185.

If two take a lease for their lives, and make partition, either of them dying, his part immediately reverts to the lessor.

If there be two joint-tenants for life, and one of them makes a lease for eighty years, to begin after his death, and after dies, this lease is good against the survivor. *Goldsb. Rep.* 187.

If a lease be made to the husband and wife, yielding a greater rent than the land is worth, if the husband die, the wife after the husband's death may refuse the lease, to save her from the payment of the rent: But if the husband over-live the wife, and then make his executors, and dies, if they have assets, that is, if they have goods sufficient of their testator to pay the rent, they cannot refuse it: But if they have not goods sufficient of their testator to pay the rent to the end of the term, if they relinquish the occupation, they may by special pleading discharge themselves of the rent and the lease. *Doctor and Student*, l. 2.

c. 33.

If a man makes a lease for years, and afterwards the lessor enters upon the land let before the term

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is expired of determined, and doth make a lease of these lands to another; this second lease, it is said, is a good lease until the first lessee doth re-enter, and then the first lease is revived, and the first lessee is again in possession by virtue of the first lease. *Pract. Reg.* 403.

Where a lease for years is made by the words, demise, grant, and to farm let, the lessee is not in possession so as to bring trespass, &c. until an actual entry. But where the words, bargain and sell, (for a consideration of money) are in, altho' but for a shilling, the party is in possession presently upon executing the deed so as to bring trespass, &c. *Ibid.*

If I let lands in which are mines or trees, I cannot enter to take the trees or mines, but am a trespasser, unless I do reserve such a privilege to myself when I let the lands.

But if a lessor do come upon the ground leased, he is no trespasser, for it shall be intended that he came to see if waste were done.

It is noted, That if a man opens a mine in his own land, he may dig and follow the vein under another man's ground; but if the owner dig there also, he may stop his further progress. 2 *Vent.* 342.

Concerning leases and grants made of the duchy of Cornwall, vide *Stat. 6 Annæ, c. 25.*

If a tenant for years happen by any casualty to lose his lease, yet he shall not lose his term in the lands let by such lease which is lost, if it can be proved that there was such a term let to him by indenture, and that it is not determined.

Where by an order confirmed by act of parliament, That an indenture shall be vacated and cancelled,

cancelled, it is not intended that the indenture shall be void *ipso facto*, but that it shall be made void by cancelling of it, and until the cancelling the estate granted by the indenture continues. 1 *Saund.* 201.

An insensible clause does not make the residue of a deed vitious, which is sensible of itself. 1 *Saund. Rep.* 320.

All feoffments, gifts, grants and leases made by duress of imprisonment are voidable, and that not only by the parties themselves, but by their heirs, and those who have their estates. *Perk. Sect.* 16. *Co. on Lit. f.* 253. *b.*

If a layman who is unlearned, and cannot read, be bound to seal a lease, bond or other writing to another; in this case he need not do it, without there be some there to read them to him, if he request it, and in such language as he understands: And if it be read amiss to him, or declared contrary to what it is, so as the illiterate man is thereby deceived; as a bond of twenty pounds is read as of twenty shillings, or feoffment of two acres is read as of one; in such case he may very well plead, that it is not his deed; but if he request not to have the writing read, though it be contrary to his intent and meaning, yet it shall bind him, if he seal and deliver it, for it was his folly that he did not desire to have it read. *Co. 2 Rep. f.* 3, &c.

Where one makes a lease, rendering rent to be paid at a place off from the land, a demand on the land is not sufficient, but it must be made at the place appointed. *Trin. 5 Jac. C. B. Ventris's and Farmer's case, 1 Brownl.* 96.

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The demand ought to be at the setting of the sun on the day of payment, and at the most notorious place. *Pasch. 3 Jac. C. B. The Dean and Chapter of Chichester's case, 1 Brownl. 138.*

If the lessor would take advantage of a re-entry for non-payment of rent, he or the person he impowers to demand it for him, must take care not to demand a penny more or less than is due, and must shew the certainty of his rent, and when it was due, or the demand is not good, and no re-entry shall be given unless the demand be precisely and strictly followed. *Mich. 31 Eliz. C. B. Falcon and Winsor, Leon. 35.*

Where a lease is made of lands at will, rendering rent, the lessee cannot determine his will two or three days before the rent is payable, and so defraud the lessor of his rent, any more than the law will allow the lessor to determine his will, after the lands are sown; but as the one shall have the emblements, the other shall have his rent: So that the lessee cannot determine his will but at the rent-day, unless he pays rent until the next day of payment after his departure. *1 Siderfin 369.*

Where a tenant is held by force out of his farm or tenement by soldiers in time of a rebellion, a court of equity cannot relieve him, but he must pay his rent: So where his grounds are overflowed that he can receive no profit by them, he must pay his rent notwithstanding, nor can he be relieved in equity. *Sir John Harrison against the Lord North, Pasch. 19 Car. 2. Chan Cases, 1 Part, p. 83.*

A lease was made with a condition of re-entry for non-payment of rent; the lessee paid his rent
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to the lessor, who accepted it and put it up; but afterwards finding bad money amongst it, he refused to carry it away, and entered for the condition broken. It was adjudged that this entry was unlawful, for his having once accepted the rent, bars him from taking any advantage. *Wade's case, Trin. 43 Eliz. C. B. Rot. 406.*

If a lease be made upon condition that the lessee shall do no waste, and he does commit waste, if the lessor afterwards accepts the rent, he cannot enter; but if the condition had been, if he committed waste, that then his estate should cease, there no acceptance of the rent could make the lease good. *Mich. 29 Eliz. B. R. Godb. 47.*

A lease was made of lands in Ireland, with a covenant for payment of the rent in London: And it was resolved, That an action of covenant cannot be brought in England for rent reserved on a lease of lands in Ireland. *Barker v. Damer, Hil. 2 W. & M. B. R. Show. 191. Salk. 80.*

The words *yielding and paying* are an express covenant for payment of rent. *1 Sid. 266.*

In debt for rent upon a lease at will, the plaintiff must shew the defendant occupied the premises; for the rent is due only in respect of the occupation, and therefore it must appear to the court when the lessee entered, and how long he occupied: But in debt for rent upon a lease for years, the plaintiff need not set forth any entry or occupation; for if the defendant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation. *Bellasis v. Burbrick, Mich. 8 W. 3. C. B. Salk. 209. 3 Salk. 136. Lord Raym. 170, 280.*

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In ejectment, on a condition of re-entry for non-payment of rent, the confession of lease, entry and *ouster* is sufficient, and proof of actual entry and *ouster* is not necessary. *Little v. Heaton*, *Salk.* 259.

Covenant on indenture for non-payment of rent; the plaintiff declares that he was seised of tithes, and by indenture demised them to the defendant, rendering rent, and the defendant covenanted to pay it, and he assigned his breach in non-payment of so much; and the defendant pleaded eviction. The plaintiff demurred. Judgment for defendant, because it is a rent, and the eviction is a suspension of it, and therefore a good plea. 1 *Lord Raym.* 77, *Dalston v. Reeve*.

A lease is made for years to *E. G.* reserving rent. *G.* enters, and dies possessed; *S.* his executor, 4th June 1658. assigns to *P.* and *P.* the 4th June 1689. assigns to *J. M.* and for half a year's rent due on the 1st of January 1689. Covenant was brought against *P.* The sole question was, if notice of the assignment should be given to the plaintiff; and adjudged maintainable by three justices, *contra Ventris*. But this judgment was afterwards reversed in *B. R.* upon the point in law, viz. that notice of the assignment to the plaintiff was not necessary; for by the assignment the privity of estate was gone, and there was nothing to support the action against the defendant, he being only assignee. 2 *Vent.* 234. *Tovey v. Pitcher*.

Judgment in *C. B.* reversed in *B. R.* and the court held, that there was no privity of estate or contract between the plaintiff and defendant, and these failing, the plaintiff's action must fail likewise,

wise, because that must be founded either upon the one or the other; and as to an objection that it might be assigned to a beggar, the court answered, that it was the lessor's own fault, and folly to take the first assignee for his tenant, and that the lessor was not without remedy; for that he might bring covenant against the lessee's executors, or he might distrain on the land. *Show.* 340. *S. C.* in *B. R.* and judgment in *C. B.* reversed. 4 *Mod.* 71. *S. C.* in *B. R.* and that judgment in *C. B.* reversed. *Carth.* 177. *S. C.* adjudged in *C. B.* but reversed in *B. R.* 12 *Mod.* 23. *S. C.* and judgment in *C. B.* reversed, and *nil dictum* as to point of notice. *Comb.* 192. *Richards v. Jervoy*, *S. C.* and by *Holt* chief just. assignment by assignee discharges him; because he was only chargeable as having the land; and there is no more reason for his giving notice to the lessor of his assignment over, than of the assignment to him by the lessee; and judgment in *C. B.* was reversed. *S. C.* cited lord *Raym. Rep.* 368. and *Holt* chief justice, said, that that judgment of *C. B.* was reversed in *B. R.* by the opinion of the whole court, which reversal was grounded upon the reason of *Walker's case*, 3 *Rep.* 23, &c.

In debt for rent against the defendant as assignee of a term, he pleaded that he had made a further assignment to one *Reed* before the time for which the rent was demanded. To which the plaintiff replied, *non assignavit*. And on the trial it appeared, that the defendant being weary of the assignment he had taken, employed a person to find him one who would take it off his hands; and *Reed*, a poor woman, then a prisoner in the *Fleet*, was prevailed

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vailed on to accept it; and *Nash* in consideration of 5*s.* (which it appeared he lent her for that purpose) made a formal assignment. The defendant insisting that this was not proper evidence on *non assignavit*, but that the plaintiff should have replied *per fraudem*; the chief justice held, it could not be gone into on this issue, according to the case in *Hob.* 72, 166. The plaintiff became nonsuit.

And now a new action being brought, and fraud replied; it was debated, whether this was to be considered as fraudulent or not; and the chief justice directed the jury to find for the defendant. He said the defendant could not be charged upon the privity of estate, which was destroyed as against him by the legal assignment to *Reed*: and it was the folly of the plaintiff to discharge the original lessee: That *Reed's* being a beggar did not alter the case, as was said in *Pitcher v. Torrey*, *Salk.* 81. 4 *Mod.* 71. He grounded his opinion chiefly on two modern cases in chancery, where this had been determined to be no fraud. The first was *Valliant v. Dodimead*, 2 *May* 16 *Geo.* 2. and *Huddle v. Hawksby*, 4 *February* 1744. upon the foot that an assignee ought not to be chargeable any longer than he occupies the premises.

This being merely a point of law, the chief justice told the jury, they must find for the defendant: which they were very unwilling to do, and therefore to prevent their going contrary to his opinion, I suffered a nonsuit. *Lekeux v. Nash*, 2 *Stra.* 1221.

The plaintiff claims under a term for years which originally belonged to one *Herbert*, and after having been granted to different persons, at last

last vested in one *Charles Grake*, his residuary legatee, and one *Sedgewick* his executor: In *May* 1727. *Susan Grake* created a new term out of the old by granting an under-lease to *Richard James* for thirty-six years, rendering the rent of 70*l. per Annum*. The executor of *Charles Grake* did not join in this lease, and therefore only the equitable interest in the houses passed by it. In 1728. *Richard James* made a mortgage of these houses to *Valliant*; afterwards, on the 31st of *May* in the same year, *Susan* or her representatives by indenture assigned to *Valliant* a term of thirty-nine years and a half, together with another reversionary term of twenty years in these premises, so that *Valliant* became not only mortgagee under *Richard James*, but was intitled likewise to the rent of 70*l. per Ann.* which before belonged to *Susan*; *Sedgewick* was no party to this deed: Soon after the execution of the last deed *Richard James* built some new houses upon the premises, in consideration of which *Valliant* agreed to pay him a rent of 20*l. per Annum*, and in order to secure the payment of this rent in 1730. *Valliant* demised the premises to *Rouse* in trust, to pay 20*l. per Ann.* to *Richard James*, and as to the residue for the benefit of *Valliant*.

The consequence of these things was, that as matters then stood, *Valliant* would have had a remedy against *Richard James* for the 70*l. per Ann.* and *Richard James* would have been intitled to a deduction of the 20*l. per Ann.*

In July 1731. *Richard James* makes an assignment to *Dodmede* of his equity of redemption in the thirty-six years term, and also of the rent of 20*l. per Ann.* by way of mortgage for securing
300*l.*

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300*l.* lent by *Dodemedé*: In the mortgage deed was an exception of the rent of 20*l.* *per Ann.* and likewise of four houses which *James* had lately built.

On the 17th of July 1733. other sums were advanced by *Dodemedé* to *Richard James*, amounting in the whole to 1300*l.* or 1400*l.*

In a short time after *Dodemedé* enters into possession as mortgagee, and whilst he was so possessed, paid the rent of 70*l.* *per Ann.* to *Valliant*.

In 1737. a fire broke out which consumed five of the houses, but *Dodemedé* had insured some of them.

About this time *Dodemedé* made a proposal to *Valliant* to surrender the premises to him, and in order to induce him to it offered, that he should have the insurance money, amounting to 250*l.* and that he would sell him the rent of 20*l.* *per Ann.* for 300*l.* and that, if he would not agree to do it, he would assign the premises to any body.

Valliant rejected this proposal without making any on his side, and applying to the fire-office for the 250*l.* insurance, upon *Dodemedé*'s refusing to rebuild the houses which were burnt, and *Valliant*'s agreeing to do it, the fire-office paid *Valliant* the money accordingly.

Dodemedé took a good deal of pains to find out a person who would accept of the assignment, and at last prevailed upon *Lomax*, a prisoner in the *Fleet*, for the price of four guineas to accept of it, and *Dodemedé* made an assignment of it accordingly: From that *Dodemedé* never received any part or the profits of these houses.

The bill is brought by *Valliant* and others against *Dodemedé* and others, praying amongst
other

other things, that the assignment made by *Dodemedé* to *Lomax* might be set aside as fraudulent, and in consequence of it that *Dodemedé* should be obliged to pay the rent of 70*l.* per *Ann.* to *Valliant*.

Lord chancellor: As to the arrears of rent incurred before the fire, it is extremely plain, that *Dodemedé* is liable to make satisfaction to the plaintiff, because during that time he was in possession of the rents and profits of the estate; however, as he has made an assignment to *Lomax*, *Valliant* has no remedy for these arrears at law, and is under a necessity of coming into this court for its assistance.

The next question is, whether *Valliant* is intitled to the aid of this court to recover the arrears which incurred after the fire, and before the assignment to *Lomax*; and though it is more doubtful than the other question, yet I am of opinion that he is intitled, for notwithstanding the accident of the fire, *Dodemedé* continued in possession of the houses which were unburnt, and received the rents of the under-tenants, and was certainly liable therefore at law; and as *Valliant* cannot dis-train on account of the assignment to *Lomax*, he ought to have the assistance of this court.

But there is a great difference in regard to the arrears incurred since the assignment to *Lomax*; and it would be going too far if the court was to assist the plaintiff against *Dodemedé* in this respect, for the law says an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land; and if it be so at law, it is reasonable he should in equity, which in cases of this kind follow the law; though

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though indeed it is true, that in some sort of assignments made by tenants the court has interposed. *Vide Treacle v. Coke, Vern. 165. and Philpot v. Hoare, Nov. 26, 1741.*

But these cases are distinguishable from the present, and particularly the last, for the great point there was, that the party to whom the assignment was made, or pretended to have been made, acted really as an agent only for the assignor; there was no proposal, as in the present case, to surrender up the premises to the landlord, and if there had, the court declared they should not have relieved.

Where there was an express offer by *Dodemedé* to surrender the premises to *Valliant* on certain terms, which by no means appear to be unreasonable.

Besides too here was a general calamity, and an unforeseen one from fire; and as *Dodemedé* lent to *James* 1300*l.* or 1400*l.* upon the estate, which he is likely to lose, it would be extremely hard to oblige *Dodemedé* to pay the 70*l.* rent, since the assignment to *Lomax*, especially as *Valliant* has received the 250*l.* from the fire-office, notwithstanding *Dodemedé* made the assurance.

The last question relates to the 20*l. per Ann.* which was agreed to be paid by *Valliant* to *Richard James*, whether it ought not to be deducted out of the 70*l. per Ann.*

I am of opinion that it ought, whoever is intitled to it, the representative of *Richard James*, or the defendant *Dodemedé*; for it is the ordinary direction of this court, that such sort of demands should be set one against the other. 2 *Atk. Rep.* 546. *Pl. 322. Valliant v. Dodemedé.*

Monday

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Lord Chancellor, *Monday the 4th day of
February 1744.*

Stracey pro Quer. The scope of the plaintiff's bill is to have an account of the rents and satisfaction for our damages, and to have the assignment of the lease to *Levy* delivered up, or set aside.

Lawson pro defendant *Hawksby* opens his answer.

Umfreville pro defendant *Levy* opens his answer.
Mr. Chute pro plaintiff.

William Hartford read, *James Kelly* read, *Oliver Aiton* read, *Samuel Aldridge* read.

Mr. attorney general for defendant *Hawksby*.
William Smith read.

The bond from *Francis Hawksby* to *Nathaniel Underwood*, dated the 20th of *March 1729*. read.

Cur. Let the plaintiff's bill be dismissed without costs, and Let the plaintiff deliver up to the defendant *Hawksby* the bond given by him to *Underwood*, dated the 20th of *March 1729*; and the same was delivered up in court accordingly.

CHAP. IV.

Of Corn sown, who shall have the Crop. Of Estovers, and Trees blown down. Of Distresses; what Things may be distrained, and how used: Who may take a Distress; for what Cause, when, and where.

IT is an usual saying, and generally received opinion, that he that sows must reap: But as there is no general rule, without some exception, so this holds not always, that he that sows shall reap.

But touching the sowing of corn, if the tenant be outed, or his term ends before it be ripe, who shall have the corn I have already set down in the first *chapter* under the title of *Tenant at Will*: For if a tenant at will sow his land, and the landlord put him out before the corn be ripe, he shall have liberty to reap and carry away his corn, because he knew not when his landlord would put him out.

But it is contrary with a tenant who hath a lease for years; for if his lease be out before the corn be ripe, his landlord shall have it, because he knew the end of his lease: Wherefore if he sowed, it is in his own wrong, unless there be a covenant in his lease between the lessor and him, that he shall have his way-going crop. *Vide antea.*

G

If

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If lessee for years at the end of his term leaves corn upon his land, the lessor cannot put in his cattle to eat it. *Lord Raym.* 189. *arguendo*. This must be understood of corn severed.

But if a tenant at will sets roots, or sow hemp hemp or flax, or any thing that brings in any yearly profit ; if after the planting the lessor out him, or if the lessor die, yet the tenant or his executors shall have the crop. But it is otherwise if he plant young fruit-trees, or other young trees, as oaks, ashes or elms, or sow the ground with atorns ; in this case, if the lessor out him, he shall have none of these, because these yield no yearly profit at present.

Where an action lies against such as hinder taking away his emblements, as corn growing, grafs, fruit of trees, hemp, flax, &c. *Co. Lit.* 56. *Keilw.* 125, 160.

If a tenant for life soweth the ground, and die before the crop be ripe, his executors shall have it, and so they shall have grafs if it be cut ; but if it be *unmown*, they shall not have it, for that is part of the inheritance until it be severed.

Every tenant that hath an estate incertain, shall have the corn sown by him, though he be outed before it be ripe.

If the lessee sow the land, and then surrender his term, the lessor, or he to whom the surrender is made, shall have the corn ; so if a man enter for condition broken, he shall have the corn, and not he that soweth the corn, for his entry overreacheth the estate of the other. *Godb. Rep.* 189. Because it is either by the party's own act or mistake.

If

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If a lessee for years sow the land, and then commits waste, and the lessor recovers the land in an action of waste; here the lessor shall have the corn sowed. *Perk. Sect. 515. Cowell's Inst. 152.*

If a tenant for life lease for years, and the lessee sows the ground, and before it be ripe the tenant for life dies; yet notwithstanding the lessee for years shall have the corn, or his executors if he be dead. *Co. Lit. 55. b.*

Tenant for life, remainder in fee; tenant for life leaseth for years; the lessee is ousted by a stranger, and the stranger sows the land, and the tenant for life dies; in this case it was resolved, that the corn of right belonged to the lessee of tenant for life, and not to the stranger, nor him in remainder. *Goldsb. Rep. 143. pl. 60. 5 Co. 85.*

If *A.* taketh a lease of land for the life of *B.* and sows the land, and before the corn be ripe *B.* dies, yet, notwithstanding *A.* shall have the corn, for his estate was determined by the act of God; and the reason why a man which hath an uncertain estate shall have the corn, is, for that he hath manured the land; and therefore it is reason, that he that laboureth should reap the fruits of his labour: Therefore if a man make a lease for life of ground sowed, and before severance the lessee dies; in this case the lessor shall have the corn, and not the executor of the lessee for life, for the corn came not of the manurance of their testator. And if lessee for life sow the land, and then assign over his interest, and dies before the corn be severed; here he in reversion shall have the corn, and not the assignee of the lessee for life. *Goldsb. Rep. 144.*

2. For in both cases they seem to have purchased the right of the person sowing it, and stand in the same equity, and the true reason of giving emblements to lessee, where the landlord's estate is uncertain, is for the benefit of the common-weal, lest the precariousness of such possession might make the tenant leave his lands unsown.

If a man by his will devise lands sowed to one for life, and after his decease the remainder to another for life, and the first tenant enters and dies before severance, and he in remainder enters; now he shall have the corn; and not the executors of the first tenant for life. *Goldf. Rep.* 144. And this stands with the reason of my *quære*, tho' the remainder-man has the corn sown; for a purchaser under a devise has not the same equity as the purchaser for valuable consideration, and the testator was willing to give each of them the land with all its benefits, *diversis temporibus*.

If a man be seised of land in right of his wife, and sow the land, and die, his executors shall have the corn; but if they be joint-tenants of the lands, and the husband soweth the ground and dieth, the wife shall then have it on account of the survivorship. *Co. on Lit. f.* 55. *b.* *Perkin's Sect.* 518. *Dyer* 316.

And if a woman, who is tenant for life or in dower, take an husband, and he sow the land, and before it be ripe she dies, yet the husband shall have the corn. *Cowell's Inst.* 141. *Swinb. Sect.* 6. *p.* 163.

And so if the husband let the lands of his wife for years, and the lessee sows the lands, and before severance the wife dies, yet the lessee shall have the corn, or his executors, if he be dead. The like

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like law of lessee for years of tenant by the curtesy, when tenant by the curtesy dies before his lessee's corn is ripe and severed. *Cowell's Inst.* p. 141.

If a woman who holds lands *durante viduitate sua* sow the ground, and then takes husband before the corn be severed; in this case the lessor shall have the corn. And so if tenant at will sow the land, and then will occupy the land no longer, he shall then lose the corn; and the reason hereof is, because the determination of their estates grew by their own act. *Co. Lit.* 55. b. 5 *Co. Rep.* 119.

But if such a woman, who holds lands *durante viduitate sua*, lease the same lands to another, and the lessee sows the land, and then the woman takes husband, which determines her estate, yet notwithstanding the lessee shall have the corn. So if tenant for life lease for years, and the lessee sows the lands, then tenant for life commits a forfeiture, so that his lessor enters, yet the lessee of tenant for life shall have the corn; but if tenant for life sows the lands, and then commits a forfeiture, and the lessor enters, here he shall have the corn, and not tenant for life, because the determination of his estate grew by his own act. *Goldsb. Rep.* 189.

A lease made by the husband of the wife's land in his own name only, is void after his death; but if the lessee have sown the land, he shall have the corn. *Noy's Max.* 70.

If there be a landlord and tenant, and the land is recovered by a title paramount against the landlord; in this case, if the tenant have sowed the land, he that recovered shall have the corn, if it

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be not severed before judgment; but if a common recovery be had against the landlord in a writ of entry *en le poſt*, or in any other writ by a false and feigned title, in ſuch caſe the leſſee ſhall have the corn. *Co. Lit.* 142. *Perkins Sect.* 515.

If an abator after the death of the anceſtor, enter and ſow the land, and after the right heir doth enter; in this caſe the heir ſhall have the corn. So if a diſſeiſor ſow the land, and then the diſſeiſee entereth upon him, or recovereth in an aſſize before the corn be ſevered; in this caſe the diſſeiſee ſhall have the corn; but if it were ſevered before the entry or recovery, though it remain ſtill upon the land in ſheaves or cocks, there the diſſeiſor ſhall have it. But it is otherwiſe in the caſe of trees ſevered from the land; for if they be not carried off the land before the diſſeiſee's entry, he ſhall then have them. *Goldſb. Rep.* 144. *Perk. Sect.* 519.

If a widow have land aſſigned to her by the ſheriff for her dower, and this land is ſowed with corn, here ſhe ſhall have the corn. *Vide Perk. Sect.* 521. 15 *Eliz. Dyer* 319.

Note, That the ſtatute of *Merton*, c. 2. which giveth, *Quod omnes viduæ de cætero poſſint legare blada, &c.* as unto this point, is but in affirmance of the common law; for if tenant in dower ſoweth the land which ſhe holdeth in dower, and dieth before ſeverance, her executors ſhall have the corn, if ſhe do not deviſe it to another; and ſo was the law taken in the 4th of *H. 3. Deviſe* 6. which was ſixteen years before the making of the ſtatute of *Merton. Perk. Sect.* 522. See 2 *Part. Inſt.* 83.

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If tenant in tail sow the land, and give me the corn, and die before I have severed it from the land, yet I may afterwards sever the same and take it, for that the executors of the tenant in tail should have had it. *Perk. Sect. 59.*

But if tenant in tail give or sell to me a tree growing upon the land, and dies before I have the tree, and his issue entereth into the land where the tree is growing, now I cannot cut the tree but he may have trespass against me: But it seems, if it were cut in his life-time, I may then take it away after his death. But *quare* of this, for some are now of a contrary opinion. *Kitch. 226. a. b. 27 H. 8. f. 6. 18 E. 4. f. 6. a. and Hil. 18 E. 4. f. 21. in the end. Perk. Sect. 58.*

If tenant in fee-simple give or sell me a tree growing upon his land, and die before I have cut it, yet I may have it after his death if I please. *Perk. Sect. 58.* For as he might have disposed of the whole fee, his disposal of the trees which are part thereof, is good.

There are three kinds of *estovers* in the law, which is incident to the estate of every tenant, whether it be for life or years.

1. *House-boot*, Of which there are two kinds; the one to repair the houses, the other to burn, which is called *Fire-boot*.

2. Then there is *estovers*, called *plough-boot*; that is, stuff to mend the tenants ploughs, carts, harrows, wains, and for making rakes and forks for getting in his hay and corn.

3. There is another kind of *estovers*, called *Hedge-boot* or *Hay-boot*; this is timber and wood for making gates and stiles, and boughs and

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bushes for mending and repairing hedges and fences.

1. So there is *estoverium edificandi & ardendi*, house-boot.

2. *Estoverium arandi*, or plough-boot.

3. *Estoverium claudendi*, hedge-boot, or hay-boot.

Estover or *boot* signifies an allowance, compensation or satisfaction; and any of all these boots aforementioned a tenant may take without assignment of the landlord, unless he be by the landlord restrained by special covenant in his lease, which is very usual amongst many landlords, especially if the farm be any thing considerable, then they commonly limit the tenant how much *house-boot* or *plough-boot*, or *hedge-boot*, he may take without assignment, and how much by assignment. *Vide* 2 *Co. Inst. f.* 18. *Les Termes de la Ley*, &c.

If a tenant for life or years cut down trees, or pull down houses, or suffer them to fall down, the lessor shall have the trees and timber of the said houses; for the lessee had them only as things annexed to the land, and this severance will not give him a greater estate in them, but his interest is then determined. *Co. l. 4. 32, 62, &c.*

The landlord shall likewise have wind falls; that is, timber-trees blown down by wind and tempest, because they are parcel of his inheritance, so that the tenant for life nor years cannot have them, unless it be to build withal, where houses are in decay; but if they be dotards or pollards without timber, which bear neither leaves
nor

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nor fruit in summer, the tenant shall have such when they are blown down. *Dyer* 332.

Estovers granted to be burnt in such an house, shall go to him that hath the house by whatsoever title ; for one is inseparably incident to the other. *Finch*, l. 1. c. 3. p. 15. 1 *Perk. Sect.* 104. *Kitch.* 51. a.

Lessee for life or years, tenant in dower or by the curtesy, or tenant in tail after the possibility, &c. have only a special interest or property in the trees, as things annexed to the lands, so long as they are annexed thereunto ; but if they or any other sever the trees from the land, then their interest is determined, and the lessor may take the trees as things that are parcel of his inheritance, the interest of the lessee being determined. 4 *Rep. f.* 62. *Noy's Max.* 65.

If a stranger cut down a tree, growing upon the land of the lessee for years, and carry it or the bark thereof away, the lessor at his election may either have an action of trover against the stranger, or an action of waste against the lessee ; for the property of the timber is always in the lessor, *non obstante* the statute of *Gloucester* which gives him his action of waste ; and so was the opinion of *Jones*, *Whitlock* and *Richardson*, *Hil. 7 Car. 1.* in *B. R. Berry and Reed's case*, *Cro. Rep.* 1. *Par.*

If one hath estovers incertain in ten acres of wood, and five of them descend to him, he shall have the whole out of the residue. *Critica Juris Ingeniosa*, p. 123.

If a man grant to another estovers in certain in such a wood, and afterwards the grantor makes such waste in the wood, as that there is not suffi-

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Cient store left, out of which the grantee may take his estovers; in this case he may have a *quominus* against the grantor, which is in nature of a prohibition, forbidding him to make such waste. See after concerning *waste*.

Concerning Distresses, Replevin and Avowry, &c.

A *Distress* (*Districcio*) is a thing found upon the same land, and taken for rent behind, or other duty, or for *damage-feasant*, i. e. doing damage, though the property of the thing belongeth to a *stranger*.

Distress is a law of custom; that is, if rent be in arrear and unpaid, the landlord may take a lawful distress; and that he shall put in pound overt, there to remain until he be satisfied of what he distrained for.

So that if a landlord distrain the cattle for rent, and put them in a pound overt, and the beasts die there for lack of meat, it is at the peril of him that owned the beasts, and not of him that distrained; for in him that distrained there can be assigned no default, but the default was in the other, because the rent was unpaid. *Doctor and Student*, l. 1. c. 5. p. 10.

Now a distress must be made of such a thing, wherein some body hath a certain and valuable property; and therefore such things as are *feræ naturæ*, i. e. of *wild nature*, as dogs, conies, &c. cannot be distrained; neither can any one distrain a horse if any body be on the back of him; nor any thing which a man holds in his hands, or carrieth about him, annexed to his body.

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And although the law be, that the landlord may distrain any thing that he finds *levant* or *couchant* upon the premises for his rent behind, whose goods or chattels soever it be, and may detain the same until his rent be satisfied; yet this general rule hath some restriction and limitation, for there are several things whereof a distress cannot be taken.

Such things as are for the maintenance and benefit of trade, cannot be distrained for rent; as an horse that is shooing in a smith's shop for the rent of the shop; nor an horse in an inn cannot be distrained for the rent thereof; nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn, nor meal in a mill for the rent thereof; for the *common presumption* is, that such things belong not to themselves, but to others. For this reason, an horse, &c. put out to pasture by way of *agistment* (because it is *presumed* to belong to the owner of the ground) may be distrained.

But any thing that the tenant hath distrained for *damage-feasant* may not be distrained, for that is in the custody of the law. *Noy's Max.* 124. *Terms of the Law*, Tit. *Distress*.

Likewise oxen of the plough may not be distrained; nor a mill-stone, though it be raised to be picked, so long as it lies upon the other stone. *Co. Lit. f.* 47.

Neither may a distress be taken of sheep, if there be a sufficient distress besides.

Neither can a man sever horses joined together, or to a cart; 1 *Vent.* 36. but he ought to have distrained cart and all, according to 20 *Ed.* 4. 3.

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Likewise victuals, nor sheafs or flocks of corn, cannot be distrained †; but carts or waggons loaded with corn may be distrained, either for rent or *damage-feasant*. *Co. Ibid.*

A distress of a cart loaden with corn, and four horses to it, was adjudged not to be excessive, because he could not sever the horses. *Vide 3 Cro. 7. 2 Vent. 183.*

No man's tools wherewith he works at his trade shall be distrained; as the carpenter's ax, or a scholar's books, &c. *Coke, Ibid. Vide Lord Raym. 384. 12 Mod. 216.*—while any other distress can be found.

Neither can any thing which is fixed to the freehold be distrained; as furnaces, coppers or fats fixed for dyers or brewers, (although the tenant may recover them during the term), nor the windows or doors of a house while they are upon the hinges: But if they be removed off from the hinges they may be distrained.

The landlord cannot distrain tables dormant in the house of his tenant, or any thing which cannot be attached in an assize; neither can any thing be distrained of which the sheriff cannot make a replevin, or that cannot be restored again in as good a condition as it was when it was distrained.

But the beasts of a *stranger* that escape into the *landlord's* ground, may be distrained for rent, tho' they have not been levant and couchant, *i. e.* tho'

† But see afterwards the *Stat. 2 W. & M. p.* made for *Distresses*.

they

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they have not been in the ground for a good space of time, or so long as to have *lain down* and *rose up* again to feed. Otherwise, if the tenant of the land is in fault, in not keeping up his mounds, by reason whereof the beasts come upon the lands. *Vide 1 Inst. 47. b.—See Post.*

The lord of a *leet* may sell a distress taken for an amerciaments in his *leet*, as the king may sell a distress, because it is the king's court.

But it is to be noted, That a court-leet can amerce for nothing but only publick nuisances, and not for particular trespasss or damage to the lord, or any other. *Vide 1 Saund. 135.*

And see *1 Vent. 105. T. Raym. 204.* That although by common right a distress may be taken for a fine in the court-leet; that is, where it is imposed for such things as are of common right incident to its jurisdiction, as for contempts and the like; yet where custom only enables them to set a fine, it cannot be distrained for without a custom so to do.

That for amerciaments in a *leet* the lord may distrain, although it be in the highway; but for amerciaments in a court-baron he may not, neither for an amerciaments in a *leet*, in a place seised into the king's hands for the king's debt. *Vide Doctor and Student, l. 2. c. 9.*

If a man distrain goods or chattels, they must be impounded in a *pound covert*, (within three miles in the same county); for if they are put into a *pound overt* and damaged, or stolen, the landlord must answer for them; as he must if himself doth any harm to them, or any other distress. *Wood's Inst. 191.—But see Post.*

If

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If they be living cattle, they ought to be put in a common pound, or else in some open place, as in his own yard or close that distrained them, or in some other's by his consent; so that the owner may come lawfully to feed them: And the Owner of the cattle must have notice where they are, if they be not in a common pound; and then if they die for want of meat, it is the owner's fault (as it is said before); but if they be in a pound covert, or out of the county, and die for want of meat, then he that distrained them shall make satisfaction for them.

Cattle taken *damage-feasant* may be impounded in the same pound where they are *damage-feasant*, but goods and cattle taken for other things may not. *Kitchin*, f. 207. But see *Stat. 11 Geo. 2. Post.*

No man ought to drive a distress out of the county † where it is taken, nor out of the hundred, but to pound *overt* within three miles; neither may a distress be impounded in several places, nor above four pence taken for the fees of impounding one whole distress, on pain of five pounds. *Co. 1 Par. Inst. p. 57. Rastal, Tit. Distress 11.*

† The defendant justified impounding cattle *damage-feasant*. And on evidence it appeared he put them into the next pound, though in another county. And on 3 *Lev. 48.* the *Chief Justice* held it did not make him a trespasser, though it subjected him to the penalty in the *Stat. 1 & 2 P. & M. c. 12.* Verdict for defendant. *T. 21 G. 2. Gimbart v. Pelab, in Middx. 2 Str. 1272.*

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If a man distrain beasts *damage-feasant*, and put them in the pound *overt* within the same county, not above three miles out of the hundred, and the owner suffers the beasts to die for lack of meat, the loss is his own, and he that distrained them may be at liberty to bring his action for the trespass, if he will; and if it be not a lawful pound, then it is at the peril of him that distrained them; and so it is if he drive them out of the shire, and they die there. *Doctor and Student, l. 1. c. 27.*

If the owner of the cattle tender amends to him that distrained, and he refuses it, yet the owner may not take his cattle out of the pound, for he may not be his own judge; and if he do, a writ *de parco fracto* for breaking the pound lieth against him; but he must sue a *replevin* to have his cattle delivered him out of the pound, and afterwards plead his tender of amends, of which the jury must end the controversy. Also the owner must look to give them meat. *Ibid.*

But if the owner of the cattle procure a *replevin* to deliver them, and he that distrained them resist it, and will not deliver them; in this case, if they die after for want of meat, it is at the peril of him that distrained, and the owner shall recover damages against him in an action upon the statute for not obeying the king's writ. *Ib.*

If a man sends his servant to take a distrefs for rent or service, who puts it in the pound, if the owner of the beasts or a stranger take them out, the master shall have an action *de parco fracto* for breaking of the pound.

And if one distrain cattle, and pound them in another man's close with his consent, and the owner of the cattle come and take them out; in
this

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this case he that made the distress shall have this action for pound-breach, and the owner of the close an action of trespass for breaking of his close.

If a man break the pound and take out goods, he that distrained may have *parco facto* against the party; and may also take the goods again wheresoever he finds them, and put them in the pound again. *Co. Lit. f. 47, b. &c.*

A man distrained, for ten pounds due at *Michaelmas* for rent, goods which were not of the value of forty shillings, and afterwards distrained for the residue; and it was adjudged that he could not avow, for the distress is not good, and it was his folly that he would not take a sufficient distress at first: But if a man be behind of his rent at several days, and the lessor take a distress for one day at one time, and for another day at another time, this is good. *Moor's Rep. pl. 26.* But see after, *Stat. 17 Car. 2.*

If the lord distrain the cattle of his tenant, though nothing be behind, the tenant for the respect and duty which he owed to the lord, and which belonged to him, shall not have an action of trespass against him *vi & armis*; but if the lord command his bailiff in such case to distrain where nothing is behind, the tenant shall have an action of trespass *vi & armis* against the bailiff. *Hughe's Grand Abridgment, 1 Par. p. 311. c. 7. 4 Rep. f. 11.*

If there be lord and tenant by rent or other service, if the rent be behind, the lord may enter into the tenant's house, if the door be open, and distrain for the rent or service, notwithstanding that the tenant holdeth lands in which he may distrain

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distrain. 38 H. 6. 28. Co. 5 Rep. f. 92. But a lord cannot break open the gates, or break down fences and inclosures to make a distress. Co. Lit. 161. a.

If a man seised of lands in fee maketh a lease for life thereof, and afterwards he granteth a rent-charge, though the grantee cannot distrain the cattle of a stranger who is in possession of the land for the rent, yet if the grantor's cattle come upon the land, he may then distrain them for the rent. Brownl. 1 Par. f. 32.

Note; The statute of *Marlebridge*, c. 4. forbids the lord to take excessive distresses upon his tenant for rent or services, on pain of being grievously amerced. As for example; if the lord distrain two or three oxen for twelve pence, or the like small sum, and the owner bring a replevy of the oxen, and then the lord avow the taking of them for twelve pence, here of his own shewing he shall make fine, &c. or the party grieved may have his action upon the statute. F. N. B. 89. 8 H. 4. 16. 11 H. 4. 2. Regist. 97. Co. 2. Par. Inst. f. 107.

But if the lord distrain an ox or an horse for a penny, if there were no other distress upon the land holden, then this distress is not excessive; but if there were a swine or calf, &c. then the taking of the ox or horse is excessive, because he might have taken a beast of less value. 2 Co. Inst. fol. 107.

Yet an information lies not against a landlord for making excessive distress of tenants, because he ought to be amerced by the statute of *Marlebridge*, c. 4. whereas upon an information he must of necessity

cessity be fined. 1 *Vent.* 104. 2 *Inst.* 107. *Raym.* 193, 205. 1 *Mod.* 71, 288.

There be certain cases where a man may distrain of common right, and where not of common right: A man may distrain for rent-service, homage, fealty, escuage, suit of court, or for rent reserved upon a gift in tail, lease for life, years, or at will, though there be no clause of distress in the lease, because these distresses are of common right. *Co. Lit.* 204, 205.

But for debt, account, trespass, or for reparations, or the like, a man cannot distrain, neither can any distress be taken for any services which are not certain, nor can be reduced, or brought into any certainty. And upon an avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to certainty. *Doctor and Student*, l. 3. c. 4, 9.

Nevertheless (although it be a paradox) in some cases, there may be a certainty in an incertainty: As for a man to hold of his lord to shear all his sheep depasturing within the lord's manor; and this is certain enough although the lord hath not always a certain number of sheep, but sometimes a greater number, and sometimes a lesser; yet this incertainty, being reduced to the manor which is certain, the lord may distrain for. And a distress is inseparably incident to every service that may be reduced to certainty.

If there be lord and tenant, and the tenant pay the lord a greater rent than is due to him, and that voluntarily without coercion of distress; in this case the lord having gained seisin, may distrain for such surplussage of rent, and the tenant cannot avoid it upon the lord's avowry, because of the
seisin

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seisin of the rent ; but in such case he may have his remedy by a writ of *ne injuste vexes* upon the statute of *Magna Charta*, c. 10. *F. N. B.* 11. *Co. Lit.* 25.

But *note* ; This rule holdeth not in the case of a successor, or issue in tail, for they may avoid such incroachment in an avowry ; or if the incroachment be of another nature than the service, if that be gained by coercion or distress, in such case the tenant may avoid such seisin in an avowry. *Co. 2 Inst. f. 21.*

A rent-charge was granted for years, with a *nomine pænæ* and clause of distress, if it were not paid at the day, and the rent was behind, and the years incurred ; and it was moved, if the grantee might distrain for the *nomine pænæ*, the years being incurred ? And the opinion of the whole court was, That he could not distrain for the *nomine pænæ*, for that did depend on the rent, and the distress was gone as to both. *Pasch. 19 Jac. in C. B. Tatter and Fryar's case, Winch's Rep. f. 7.*

If a horse or beast come into a man's ground as an estray, he may not work them ; neither may a man work a distress, for he hath neither property or possession *in jure* ; but if a man hath an horse, ox or cows in pawn, he hath a special property in them, and may work and use them in such sort as the owner may do. *Owen's Rep. f. 123. Cro. Jac. 148.*

If the tenant forestall the way with force and arms, and threatens in such manner that the lord dares not come to demand or distrain for the rent ; or if there be no distress on the ground, nor none ready to pay the rent, then in this case the lord may have a writ of *novel disseisin* against
the

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the tenant, and recover his rent and arrearages : And if the rent be behind another time, he may have a *redisseisin*, and recover double damages. *Co. Lit.* 153. *b.* 161. *b.* *Fleta*, l. 1. c. 42. *Noy's Max.* p. 45.

Also for heriot-service the lord may distrain or seise ; but for heriot-custom he cannot distrain, but may seise. *Doctor and Student*, f 75.

Tenant to pay a heriot-beast, or 5*l.* at the election of the lord.

A bailiff may not distrain for such heriot before the lessee hath declared his election, though the lessor may. *Lit. Rep.* 33, 35.

An heriot shall go with the reversion as well as the rent, and for which the grantor may distrain. 2 *Saund.* 166. *Vide antea.*

Also it seems a bailiff, where a lawful tender of rent has been refused, may not distrain without the command of the lessor. *Lit.* 34. *Vide ibid.* 65.

Where a lease is made to commence on the determination of another, if the new lessee dies before his term commences, it is said the heriot reserved shall not be due. 1 *Vent.* 91. 2 *Saund.* 165. 2 *Keb.* 677. 1 *Sid.* 437.

If a man hath common without number, yet he ought not to surcharge the soil, but that the lord may have the common also. 1 *Saund.* 345.

And if a tenant over-charge the soil where he has common without number, the lord may distrain him, but an admeasurement does not lie.

If a stranger puts his cattle into the common, a commoner may distrain them, but in the avowry he ought to shew damages. 2 *Lew.* 252. 3 *Lew.* 104. And that the landlord of a common cannot
put

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put in the cattle of a stranger. 2 *Lutw. R.p.* 107.
See afterwards, *Chap. VII.*

Though a man may not distrain for rent after the lease is ended, nor out of the premises, (except in some special cases), nor in the night, unless for *damage-feasant*; yet the executors or administrators of him who had lands in fee, or fee-tail, or for life, may either have an action of debt against him that should pay it, or distrain for it; and so may the husband after the death of his wife, his executors or administrators, and he which hath rent for another's life, for the arrearages after his death.

The grantee of a reversion may distrain for an heriot. 2 *Saund.* 166.

If the beasts escape into any ground, and the lord distrain them for rent, the distress is good. *Idem* 289, 290. And that it is not material whether they were levant or couchant, or not. *See after.*

Where cattle escaped out of a close next adjacent; adjudged that they might be distrained for rent, although they escape through default of the fences which the party distraining ought to have repaired. *Id.* 289.

By *Treby* chief justice, where the cattle escape accidentally, there they are not distrainable until they have been levant and couchant; but if they escape by default of the owner, they are distrainable the first minute. *Lord Raym.* 169, *Kempe and Crewes.*

In all cases when the land is the debtor, the cattle of a stranger is as well liable as those of the owner of the land; as cattle of a stranger levant and couchant are distrainable for arrears of rent-service.

service. So if a neighbour's cattle escape into land out of which a rent-charge issues, and are levant and couchant, (these are good authorities, though they are not levant and couchant) they are distrainable for the rent-charge, and the owner shall not have them again unless he pays the arrears. *Lord Raym.* 309.

A lord of the soil may distrain for *damage-feasant*, although he have no interest in herbage, for there may be other damage besides eating the grafs. 2 *Saund.* 328.

A man puts cattle into my pasture for a week, and afterwards I give him notice that I will keep them no longer, and he will not fetch them away, I may distrain them *damage-feasant*. *Noy's Max.*

33.

If a man takes cattle *damage-feasant*, and as he is driving them to pound they run into the yard or house of the man that owns them, and he refuses to let them out again, he that distrained them may have a writ of *rescous* against the owner of the beasts for so doing.

If a landlord come to distrain for rent, and see the cattle, and the lessee or his servants drive them out of his fee, he cannot have a writ of *rescous*, because the cattle were not in his possession; but he may follow after them, and distrain them in another man's ground, it being for rent, but not for *damage-feasant*; for they must be taken *damage-feasant*, that is, doing damage. *Co. Lit.* 161.

If a man distrain goods, and declare not the cause or reason whereof he doth it, if they be put in a house, the owner may break the house and take them out. *Clayton's Rep.* p. 64. pl. III.

Or if a man distrain goods, without cause, the owner may rescue them; but if they be pounded, he

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he cannot break the pound and take them out, because they are then in the custody of the law. *Lord Raym.* 104, 105. *Cotsworth v. Betifon*, S. P.

But if he find the pound door unlocked, he may take them out.

Although there be a general prohibition in the laws of *England*, That it shall not be lawful for any man to enter upon the freehold or possession of another, without permission and authority of the owner, or of law, yet this is not without exception.

For if a man drive beasts along the highway, and the beasts run in any man's corn or grass, and he that driveth them goeth after them into the grounds to fetch them out, he may justify that entry into the grounds to fetch them out. *Doct. and Stud.* l. 1. c. 10.

Also hindering the carrying of a lawful distress, is a provocation to make killing no more than homicide. *Vent.* 216. the case of *Goff*, collector of chimney-money.

The court held, that cattle driving to a market, and put into pasture by the way, were not privileged from being distrained; for it is by the statute of *Marlbridge*, That beasts cannot be distrained in the highway, and not by the common law. 2 *Vent.* 50. 3 *Lev.* 260.

Where one holds a third part of certain land, and another two third parts of the same land undivided, he who hath the one part cannot distrain the cattle which were put in by licence of him who hath the two parts. *Idem* 228, 283. *Hob.* 80, 103.

If

If a man make a feoffment, and that in fee by indenture, reserving rent, he cannot distrain for that rent, unless a distress be expressly reserved; and if the feoffment be made without an indenture, reserving rent, that reservation is void in the law. And the like law is where a gift in tail, or a lease for term of life is made, the remainder over in fee, reserving a rent, that reservation is void in the law.

Also if a man seised of land for term of life granteth away his whole estate, reserving a rent, that reservation is void in the law, without it be by indenture; and if it be by indenture, he shall not distrain for the rent, without a clause of distress be reserved. *Doctor and Student, l. 2. c. 9.*

Also if a man make a lease at *Michaelmas* for a year, reserving a rent payable at the feast of the annunciation of our *Lady* and *St. Michael* the archangel; in this case he may distrain for the rent due at our *Lady-day*, but not for the rent due at *Michaelmas*, because the time will be expired. *Ibid.*

But see after the late acts. Yet if a man make a lease at the feast of *Christmas*, for to endure to the feast of *Christmas* next following, viz. for a year, reserving a rent at the aforesaid feasts of our *Lady-day* and *Michaelmas*; in this case he shall distrain for both the rents as long as the term continues, that is to say, till the aforesaid feast of *Christmas*. *Ibid.*

And if a man have lands for term of life of *J. N.* and makes a lease for term of years, reserving a rent, the rent is behind, and *J. N.* dieth, there he shall not distrain, because his reversion is determined. *Ibid.*

And

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And if a town or parish be amerced, and the neighbours by assent assess a certain sum upon every inhabitant, and agree, That if it be not paid by such a day, that certain persons thereunto assigned shall distrain; in this case the distress is lawful. *Ibid.*

If there be lord and tenant, and if the tenant do hold of the lord by fealty and rent, and the lord doth grant away the fealty, and reserve the rent, and the tenant attorneth; in this case he that was lord may not distrain for the rent, for it is become a rent-seck. *Ibid.*

But if a man make a gift in tail to another, reserving fealty and certain rent, and after that he granteth away the fealty, reserving the rent and the reversion to himself; in this case he shall distrain for the rent, for the grant of the fealty is void; for the fealty cannot be severed from the reversion. *Ibid.*

Also if a rent be assigned to make a partition or an assignment of dower equal, he or she to whom the rent is assigned may distrain. And in all these cases aforesaid where a man may distrain, he may not distrain in the night; but for *damage-feasant*, that is, where he finds beasts doing hurt in the ground, he may distrain them night or day when he finds them, because if he was to wait till the morning they might escape off the land, and he not know whose cattle they were, so be totally without remedy: But for waste, reparations, accounts, or for debts upon contracts, or such like, no man can lawfully distrain.

If beasts be distrained *damage-feasant*, tender of sufficient amends makes the distrainer liable to damages for detainer, though not for the distress. *Lit. Rep. 34. Vide Chap. V.*

If a man distrain dead goods which may receive damage by the weather, he ought to impound them in a house, or other pound covert, within three miles in the same county; for if he impounds them in a pound overt, he shall answer for them. *Co. Lit. 47. b.*

If a horse leaps over the pound, it is not lawful for the person distraining to tie him there notwithstanding; for if the horse receive any damage, the owner may have an action of trespass, according to 27 *Aff. 64.* where a horse having leaped over the pound three times, was afterwards tied to a post there, and strangled himself.

Where one abuses a distress, he is a trespasser *ab initio*, and therefore if in trespass the defendant justifies *nomine distractionis*, the plaintiff may shew an abuse, and it is no departure, but makes good his declaration. *Gargrave v. Smith, Hil. 2 W. & M. C. B. Salk. 221.*

One who was not a common carrier undertock to carry goods from *London* to *Birmingham*, and at *Birmingham* put the goods with the waggon into his barn, where they continued two nights and a day, and then the landlord came and distrained them for his rent. *Resolv. per cur'*, That where goods are delivered to any person exercising a publick trade or employment, to be carried, wrought or managed in the way of his trade or employ, they are for that time under a legal protection and privileged from distress for rent: And it was further resolved, That any one undertaking for hire to carry the goods of all persons indifferently, is as to this privilege a common carrier, for the law gives this privilege in respect of the trader, and not in respect of the carrier.

Gisburn

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Gisburn v. Hurst, Hil. 8 Ann. B. C. *Salkeld* 249.

Where cattle escape into a man's lands through default of the lessor or his tenant, in not making up the fences, they cannot be distrained for rent arrear for such lands until the owner have notice, or until they have been levant and couchant. *Lutwych* 1578, *Kemp v. Cruwes*. But where cattle escape by default of their owner, and are trespassers, they may be distrained for rent before they are levant and couchant, or before the owner has notice of their being upon the lands. *Ibid.*

But whether the lord or the grantee of a rent-charge may not distrain the cattle of a stranger, that have escaped into lands out of which such rent is issuing, before they have been levant, &c. although there was a defect in the fences, *vide Lutw.* 1579, where it seems to be admitted.

Note; It seems goods, and the tools of a man's trade, are distrainable for a duty arising by act of parliament, though not for rent, or amerciaments, or other duties due by the common law. 2 *Show.* 127. *Sed quære.*

The servants of a grazier, driving a flock of sheep to *London*, are encouraged by an inn-keeper to put the sheep into pasture grounds belonging to the inn. The landlord seeing the sheep consents they shall stay there one night, and in the morning distrained them for rent due to him from the inn-keeper. The sheep were replevied, and the landlord obtained judgment in that action in the common pleas. Grazier relieved in equity against this distress. *T.* 1690. *Fowkes ver. Joyce* and others in *Chan.* 2 *Vern. Rep.* 129. *Pres. in Chan.* 7. *S. C.* 3 *Lev.* 260. 2 *Ventr.* 50.

An Act made in the second Year of the Reign of King William and Queen Mary, for enabling the Sale of Goods distrained for Rent.

“ **W**HEREAS the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for inforcing the payment of such rent, the persons distraining have little benefit thereby ;

“ For the remedy thereof, be it enacted and ordained by the king and queen’s most excellent majesties, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by authority of the same,

“ That from and after the first day of June in the year of our Lord one thousand six hundred and ninety, that where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease or contract whatsoever ; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to the law ; that then in such case after such distress and notice as aforesaid, and expiration of

“ the

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“ the said five † days, the persons distraining
 “ shall and may with the sheriff or under-sheriff
 “ of the county, or with the constable of the
 “ hundred, parish or place, where such distress
 “ shall be taken, (who are hereby required to be
 “ aiding and assisting therein) cause the goods
 “ and chattels so distrained to be appraised by two
 “ sworn appraisers, (whom such sheriff, under-
 “ sheriff or constable, are hereby empowered to
 “ swear to appraise the same truly, according to
 “ the best of their understandings), and after such
 “ appraisment, shall and may lawfully sell the
 “ goods and chattels so distrained, for the best
 “ price that can be gotten for the same, towards
 “ satisfaction of the rent, for which the said
 “ goods and chattels shall be distrained, and of
 “ the charges of such distress, appraisment and
 “ sale, leaving the overplus (if any) in the hands
 “ of the said sheriff, under-sheriff or constable for
 “ the owner's use.

“ And whereas no sheaves or shocks of corn
 “ loose, or in the straw, or hay, in any barn or
 “ gran-ry, or in any hovel, stack or rick, can by
 “ the law be distrained, or otherwise secured for
 “ rent, whereby landlords are oftentimes cozened
 “ and deceived by their tenants, who sell their
 “ corn, grain and hay to strangers, and remove
 “ the same from the premises chargeable with

† The landlord must remove the goods at five days
 end, or he is a trespasser, *M. 13 Geo. 1. Griffin v. Scott*,
 2 *Str. Rep.* 717. *Lord Raym. Rep.* 1424. *Barnard*.
K. B. 3; 4. But see *Stat. 11 Geo. 2. c. 19. s. 10.*

“ such rent, and thereby avoid the payment of
 “ the same;

“ Be it further enacted by the authority afore-
 “ said, That for remedying the said practice and
 “ deceit, it shall and may, from and after the
 “ said first day of *June*, be lawful to and for any
 “ person or persons having rent in arrear, and due
 “ upon any such demise, lease or contract as
 “ aforesaid, to seise and secure any sheaves or
 “ cocks of corn, or corn loose, or in the straw,
 “ or hay, lying or being in any barn or granary,
 “ or upon any hovel, stack or rick, or otherwise,
 “ upon any part of the land or ground charged
 “ with such rent, and to lock up or detain the
 “ same in the place where the same shall be
 “ found †, for and in the nature of a distress, until
 “ the same shall be replevied upon such security
 “ to be given as aforesaid; and in default of re-
 “ plevying the same as aforesaid, within the term
 “ aforesaid, to sell the same after such appraise-
 “ ment thereof to be made; so as nevertheless
 “ such corn, grain or hay, so distrained as afore-
 “ said, be not removed by the person or persons
 “ distraining, to the damage of the owner there-
 “ of, out of the place where the same shall be
 “ found and seised, but be kept there (as impounded)
 “ until the same shall be replevied, or sold in de-
 “ fault of replevying the same within the time
 “ aforesaid.

“ And be it further enacted by the authority
 “ aforesaid, That upon pound-breach or rescous

† For they cannot be removed, but must be secured
 upon the land.

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“ of goods or chattels distrained for rent, the per-
“ son or persons grieved thereby shall, in a spe-
“ cial action upon the case, for the wrong there-
“ by sustained, recover his and their treble da-
“ mages and costs of suit against the offender and
“ offenders in any such rescous or pound-breach,
“ any or either of them, or against the owner of
“ the goods distrained, in case the same be
“ afterwards found to have come to his use or
“ possession.”

“ Provided always, and be it further enacted,
“ That in case any such distress and sale, as afore-
“ said, shall be made by virtue or colour of this
“ present act for rent, pretended to be arrear and
“ due, where in truth no rent is arrear or due to
“ the person or persons distraining, or to him or
“ them in whose name or names, or right, such
“ distress shall be taken as aforesaid, that then
“ the owner of such goods and chattels distrained
“ and sold as aforesaid, his executors or admini-
“ strators, shall and may by action of trespass, or
“ upon the case, to be brought against the per-
“ son or persons so distraining, any either of
“ them, his or their executors or administrators,
“ recover double the value of the goods or chattels
“ so *distrained* and *sold* †, together with full costs
“ of suit.”

Upon a question about taking a distress, it was held, That a padlock on a barn-door could not

† Note; That the goods must be *sold* as well as *distrained*; otherwise no action for the double value.

be opened by force to take the corn by way of distress. *Vin. Abr.* 128. pl. 6.

The person distraining must give notice, but it need not be immediately, but at any time after the distress; but then the five days are to be computed from the notice, not from the distress. If the party replevy, all this is to no purpose; therefore before you venture to make any sale, search the sheriff's office within the five days.

The rent may be tendered after the five days if no appraisement, and a tender after appraisement prevents the sale, for all is but to have the rent, and no property is in the distrainer, but only in the vendee by sale.

Any persons may be appraisors that are of age and capable of being witnesses; but they must be sworn by the sheriff or constable for that purpose. The appraisement shall be in writing.

Suppose the appraisement is higher than they can be sold for, may they sell them notwithstanding?

I think they may; for the words are, *For the best price that can be gotten for the same*; and it is not said, for what they were appraised at, or above that rate. But are they bound to carry them to market, or wait for a good chapman? For the words of the act are, (*best price that can be gotten*), and no time is limited for the sale, and charges are allowed for it. I do think it most advisable, if it can be, to get the value settled by the appraisers, and to sell immediately to the first chapman; if not, to wait some small, reasonable, and convenient time, as a week or the like; if you cannot get that price, to sell to the highest bidder. And the next convenient way seems to be

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be by giving notice at the next market or parish-church, of the day and place, when and where the goods shall be exposed to sale; yet I conceive, that after the expiration of the five days, and no replevy, and an appraisement, the party may carry any portable marketable goods and commodities to the next market, as corn, or the like, and there sell them, and he shall have his charges allowed for such carriage, if he could not have a chapman at home; I think it always adviseable for the buyers to have a bill of sale of all such goods so distrained, appraised and sold, and the sheriff or constable witnesses thereto. As to the charges, I think the expence in removal of the goods, charges of food for living creatures, and moderate necessary expences for tenants and officers, will be allowed within the meaning of this clause.

For the overplus (if any) to be left in the sheriff or constable's hands, it is adviseable for the landlord to have a receipt or other writing, testifying the same; for the corn or grain the law is the same as to sale, only there it is not to be removed, if to the damage of the owner, otherwise it may. 9 *Vin. Abr.* 128. *Notes to Pl. 8.*

Upon this act, if corn be distrained in the field, the party may carry it away, or else by its lying on the ground it may spoil, and every taking and removing of the corn out of the place where it was, is a taking and carrying away in law; *per Holt* and *Powell*. For *per Holt*, the act of parliament is only, that it be not removed to the damage of the owner, and as long as it is not at the damage of the owner, it may be carried out of the field. But by *Holt*, if corn be distrained in a rick,

I doubt whether it can be carried away. 9 *Vin. Abr.* 142. *Note to Pl.* 53.

Upon the 2 *W. & M. chap.* 5. notice of the taking the distress is sufficient, when it is given to the party himself, as if he be met with at any place; and such notice *saying that the distress was taken for rent due at Michaelmas last, without particularly mentioning the quantum,* was held sufficient. 9 *Vin. Abr.* 179. *pl.* 9.

In distress on this act the notice was given to the owner of the cattle himself; it was objected that it should have been at the chief mansion-house, or other notorious place upon the premises; but *non allocat'*; for *per cur'* the intent of the act was only that the party should have notice. Notice to the owner of the goods sufficient, without notice to the lessee. Lands in divers counties demised by one demise, rendering rent, distress may be taken in either of them, and where the distress is taken for one cause, cannot be severed. 1 *Raym.* 53, 54, *Walter and Rumball.*

An Oath to be administered to the Appraisers of Goods distrained.

YOU shall well and truly, according to the best of your understanding, appraise the goods and chattels of H. R. distrained on for rent by O. P. of which goods and chattels you shall have good sight and consideration,

So help you G O D.

Another

Another Form of Appraisers Oath.

YOU shall swear, that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understandings: You shall not, through partiality, interest, or otherwise, over or under estimate the said goods, but impartially do your duties herein.

So help you G O D.

The appraisers valuing the goods too high, shall be obliged to take them at the price appraised.
Stat. 13 Ed. 1.

The Form of the Inventory and Appraisement.

*A*N inventory and appraisement of the goods seised and distrained by A. B. &c. in the house of C. D. of, &c. for — pounds, being one half-year's rent, due to the said A. B. from the said C. D. at Lady-day last: Taken and appraised the day of in the year, &c.

In the Fore Garret.

A round oak table, &c.

In the Back Garret.

Two beech matted chairs, &c.

In the Chamber Two Pair of Stairs.

A blue China bed, &c.

In the Kitchen, &c.

Valued in all at —

By us

E. F. }
G. H. } Sworn appraisers.
J. K. Constable.

Notice of Distress to the Tenant.

Mr. A. B.

TAKE notice that I have this day seised upon your goods in your house in, &c. for pounds, half a year's rent due to me at, &c. last; and have taken an inventory thereof, (a copy of which is hereunto annexed) and locked the same up in your chamber one pair of stairs; and if you do not pay the rent due, or replevy the goods mentioned in the said inventory, I shall, at the expiration of five days from the date hereof, make sale thereof, according to the direction of the act of parliament; of which take notice from

Dated, &c.

Your, &c.

C. D.

By the latter clause of the aforesaid act it seems, That if goods be distrained upon pretence for rent where none is due, yet no action lies by this act, unless

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unless they were also sold as well as distrained; so that the party must not in this case replevy his goods, if he intend to take the benefit of this act.

But he may replevy them, or let them lie, and have the benefit of the former law.

So the party distraining corn and hay, and keeping it upon the place under pretence of rent, is liable, as formerly, to an action and damages, if he cannot justify that rent was then due; and if he can, he may detain them there till replevied or sold, by virtue of this act.

And yet it seems, that after appraisement of the corn or hay, and tender of the money, and reasonable charges by some person willing to buy the same, he may not detain the corn or hay longer in the barn, granary, hovel, &c. for this would be great prejudice to the owner, if the party distraining may sell them, after appraisement, when and to whom he will. *Sed quære.*

The words are, *Be not removed to the damage of the owner* thereof. This might have been enough, if the party distraining had right; he is bound to take care of damage.

But it seems the corn and hay must not be removed; for the following words are,

But be kept there (as impounded) until the same shall be replevied or sold within the time aforesaid; that is, after the appraisement. And it is the party distraining that shall and may cause them to be appraised after five days notice: But see the act of 8 Ann. *infra.*

By the Stat. 7 Ann. c. 12. *The goods of an ambassador, or other publick minister, or his servants, shall not be distrained; if they are, the distress is void.* See 10 Mod. 4.

By

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By (a) Stat. 8 Ann. c. 14. § 1. "No goods upon any tenement leased shall be taken by any execution, unless the party at whose suit the execution is sued out, shall, before the removal of such goods, pay to the landlord of the premises or his bailiff, all money due for rent for the premises; provided the arrears do not amount to more than one year's rent; and in case the arrears shall exceed one year's rent, then the party at whose suit, &c. paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment; and the sheriff is required to levy and pay to the plaintiff, as well the money paid for rent, as the execution-money."

An (b) administrator is intitled to a year's rent, on an execution, in pursuance of this statute; without payment of any (c) poundage or other deduction whatsoever; for it is an interest (d) vested; but then he must have (e) obtained letters

ters

(a) This statute was made for the benefit of landlords, and to prevent tenants setting up sham executions to defeat landlords of their rents. *Stra.* 97.

(b) *Sira.* 97, 212. *Lil. Ent.* 46. *Gilb. Eq. Rep.* 222.

(c) *Sira.* 643.

(d) 9 *Vin. Abr.* 158. *Fortesc. Rep.* 360. *Sira.* 214. but this was overruled in *C. B.* *Sira.* 214.

(e) The administrator must make himself capable of the remedy; which he here could not; the administration of the intestate's goods not being committed till after the plaintiff in the execution had levied the money by sale of the goods; the administrator could not demand the rent, it not being certain that he would be administrator, for the ordinary might refuse; if it should be otherwise, it would

be

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ters of administration, and given the (a) sheriff (b) notice in writing, and also have made a (c) demand of the rent, previous to the (d) removal of the goods, or the money (e) levied in execution, by (f) sale of them.

A tenant was outlawed at the suit of one Greaves, and his goods and money were seized by process on the outlawry, but still remained in the sheriff's hands.

be in the power of him who is intitled to administration to defeat the plaintiff of his execution; for suppose he never takes out administration, must the execution stand still? *Stra.* 97. See *Gilb. Eq. Rep.* 222, 223. *Fortesc. Rep.* 360.

(c) The sheriff is not obliged to wait and see if any body comes and demands the rent, he cannot take notice what arrears there are; but if the landlord comes and acquaints him with it, then and not till then he is obliged to see the year's rent satisfied, before the goods are removed. *Stra.* 97.

(b) Notice to the plaintiff is no notice to the sheriff; but if it were to him, and not to the sheriff, should the sheriff be liable? As to what is reasonable notice, is not appointed by the act. *Eyre* justice said, that without notice the sheriff could not transgress the act. But by *Fortescus* justice, when the law does not determine what notice shall be given, the party must take notice, especially here, for the act says, The sheriff shall not remove, &c. and that where no person is directed to give notice, it is at his peril. 9 *Vin. Abr.* 158.

(c) If the landlord himself does not demand the rent before removal of the goods, he will be too late. *Stra.* 97.

(d) *Gilb. Eq. Rep.* 222.

(e) *Fortesc. Rep.* 360.

(f) *Stra.* 97.

It

It was now moved upon the *Stat. 8 Ann. c. 14.* on behalf of the landlord, that he might be satisfied one year's rent in arrear out of the money in the sheriff's hands.

And the court thought it ought to be granted, because a *capias utlagatum* at the suit of the party is to be considered only as a *private execution*, and is only auxiliary to the party, and ordered the sheriff to shew cause.

This order was afterwards made absolute, baron Price only then in court; but it was afterwards stirred again before lord chief baron Gilbert, Price, and Page, when the order was made absolute, *per totam (a) curiam.*

If the sheriff, after notice to him, of what rent is due, removes the goods without making the landlord (b) satisfaction, the administrator may (c) maintain an action, against the sheriff, for the removal of the goods is a wrong (d) to the (e) estate of the intestate, and he is thereby injured and (f) aggrieved.

It is enacted by *Stat. 8 Ann. c. 14. s. 2.* "That
 " in case any lessee for life or lives, term of years,
 " at will, or otherwise, of any messuages, lands
 " or tenements, upon the demise whereof any
 " rents are or shall be reserved or made payable,
 " shall, from and after the first day of May, frau-
 " dulently or clandestinely convey or carry off

(a) *Bunb. 194. pl. 271.*

(b) *9 Vin. Abr. 158.*

(c) *Str. 214.*

(d) *Str. 214.*

(e) Where the injury is to the estate, in any manner whatsoever, the action survives, if the estate survives.
9 Vin. Abr. 158,

(f) *9 Vin. Abr. 158.*

" from

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“ from such demised premises his goods or
“ chattels, with intent to prevent the landlord
“ or lessor from distraining the same for arrears of
“ such rent so reserved as aforesaid: It shall and
“ may be lawful to and for such lessor or land-
“ lord, or any person or persons by him for that
“ purpose lawfully impowered, within the space
“ five days next ensuing such conveying away,
“ or carrying off such goods or chattels as afore-
“ said, to take and seise such goods and chattels
“ wherever the same shall be found, as a distress
“ for the said arrears of such rent; and the same
“ to sell or otherwise dispose of in such manner,
“ as if the said goods and chattels had actually
“ been distrained by such lessor or landlord, in
“ and upon such demised premises, for such ar-
“ rears of rent; any law, custom or usage to
“ the contrary in any wise notwithstanding.

“ Provided nevertheless, That nothing in this
“ act contained shall extend, or be construed to
“ extend, to impower such lessor or landlord to
“ take or seise any goods or chattels as a distress
“ for arrears of rent, which shall be sold *bona fide*,
“ and for a valuable consideration, before such
“ seizure made.

“ And that whereas no action of debt lay a-
“ gainst a tenant for life or lives, for any arrears
“ of rent during the continuance of such estate,
“ it is enacted, That it shall and may be lawful
“ for any person or persons having rent in ar-
“ rear, or due upon any lease or demise for life or
“ lives, to bring an action of debt for such arrears
“ of rent, in the same manner as they might have
“ done in case such rent were due and reserved
“ upon a lease for years.

“ And

“ And that all distresses to be made as afore-
 “ said, shall be liable to such sales, and in such
 “ manner, and the monies arising by such sales to
 “ be distributed in like manner, as by an act made
 “ in the second year of the reign of their late
 “ majesties king *William* and queen *Mary*, (in-
 “ titled, *An act for enabling the sale of goods dis-*
 “ *trained for rent, in case the rent be not paid in reat-*
 “ *sonable time*) is in that behalf directed and ap-
 “ pointed.

“ And that whereas tenants *pur auter vie*, (*that*
 “ *is, for life of another person*) and lessees for years,
 “ or at will, frequently hold over the tenements
 “ to them demised, after the determination of
 “ such leases: And whereas after the determina-
 “ tion of such or any other leases, no distress can
 “ by law be made for any arrears of rent that
 “ grew due on such respective leases before the de-
 “ termination thereof; it is enacted, That it
 “ shall and may be lawful for any person or per-
 “ sons, having any rent in arrear, or due upon
 “ any lease for life or lives, or for years,
 “ or at will, ended or determined, to distrain
 “ for such arrears after the determination of
 “ the said respective leases, in the same manner as
 “ they might have done if such lease or leases had
 “ not been ended or determined.

“ Provided that such distress be made within
 “ the space of six calendar months after the de-
 “ termination of such lease, and during the con-
 “ tinuance of such landlord's title or interest,
 “ and during the possession of the tenant from
 “ whom such arrears became due.

“ But that nothing in this act contained shall
 “ extend, or be construed to extend, to let, hin-
 der

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“ der or prejudice her majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures, that are or shall be due, payable or answerable to her majesty, her heirs or successors, but that it shall and may be lawful for her majesty, her heirs and successors, to levy, recover, and seize such debts, fines, penalties and forfeitures, in the same manner as if this act had never been made.”

Note ; By an act of parliament made at *Oxford* in the seventeenth year of king *Charles* the second, it is enacted, That whensoever any plaintiff in replevin shall be nonsuit before the issue joined in any suit of replevin, by plaint or writ lawfully returned, removed or depending in any of the king's courts at *Westminster* ; That the defendant making a suggestion in nature of an avowry or cognizance for such rent, to ascertain the court of such cause of distress ; then the court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, to inquire by the oaths of twelve good and lawful men of his baliwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained ; and upon fifteen days notice given to the plaintiff or his attorney in court, of the sitting of such inquiry, the sheriff may inquire of the truth of such matters contained in the writ, by the oaths of twelve men, &c. And upon return of the inquisition, the defendant (that is, he that distrained) shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle
dis-

distraigned shall amount unto that value; and in case they shall not amount unto that value, then so much as the value of the said goods and cattle shall amount unto, together with his full costs of suit, and shall have execution thereupon by *feri facias* or *elegit*, or otherwise, as the law shall require. And in case such plaintiff shall be nonsuit after cognizance or avowry made, or issue joined, or if the verdict shall be given against such plaintiff, then the jurors that are impanelled or returned, to inquire of such issue, shall at the prayer of the defendant inquire concerning the sum of the arrearages, and the value of the goods or cattle distraigned; and thereupon the avowant, or he that makes a conuſance, shall have judgment for such arrearages, or so much thereof as the goods and cattle amount unto, together with his full costs, and shall have execution of the same as aforesaid.

And if the judgment in any of the courts aforesaid be given upon demurrer for the avowant, or him that maketh conuſance for any rent, the court shall, at the prayer of the defendant, award a writ to inquire of the value of such distress; and upon the return thereof, judgment shall be given for the avowant, or him that makes conuſance as aforesaid, for the arrears alledged to be behind in such avowry or conuſance, if the goods or cattle so distraigned shall amount to that value; and in case they shall not amount to that value, then for so much as they amount unto, together with his full costs of suit, and have execution thereof as aforesaid.

And in all cases aforesaid, where the distress is not of the value of the rent arrear, there the party

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to whom these arrearages are due, his executors or administrators may from time to time distrain again for the residue of the said arrears, which formerly a man could not do, for he might not distrain twice for one rent, for it was accounted his folly that he took not a sufficient distress at first. But now by the statute, That and several other advantages are taken away from the tenant.

Where corn taken in execution may be distrained, *vide Comyn's Rep.* 204.

By the late act for the amendment of the law, 4 & 5 *Annæ*, It is lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence.

Provided, That if any such matter shall, upon a demurrer joined, be adjudged insufficient, costs shall be given at the discretion of the court. Or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify, that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. See more of *replevin* in the next chapter.

The plaintiff brought trespass in *C. B.* for taking an *excessive* distress, and on error in *B. R.* the judgment was reversed, for that trespass would not lie where the entry at first was lawful, and here is nothing subsequent to make it a trespass, as there is where the distress is abused. The remedy ought

ought to be by special action founded on the statute of *Marleberge*, 3 *Lev.* 48. for at common law the party might make a distress of more value than the rent, so as to make it more eligible for the party to redeem the goods by payment of the rent. Here was some rent due, so a distress was lawful; and as it is but one act, it cannot be a trespass. *M.* 3 *Geo.* 2. *Lynne v. Moody*, 2 *Str.* 851. *Fitzgib.* 85. *pl.* 14.

Anno quarto Georgii 2. Regis, “ *An Act*
 “ *for the more effectual preventing Frauds*
 “ *committed by Tenants, and for the more*
 “ *easy Recovery of Rents, and Renewal of*
 “ *Leases.*

“ **F**OR securing to lessors and land-owners
 “ their just rights, and to prevent frauds
 “ frequently committed by tenants, Be it enacted
 “ by the king’s most excellent majesty, by and
 “ with the advice and consent of the lords spiri-
 “ tual and temporal, and commons, in this pre-
 “ sent parliament assembled, and by the authority
 “ of the same, That in case any tenant or te-
 “ nants for any term for life, lives or years, or
 “ other person or persons, who are or shall
 “ come into possession of any lands, tenements or
 “ hereditaments, by, from, or under, or by collu-
 “ sion with such tenant or tenants, shall wilfully
 “ hold over any lands, tenements or heredita-
 “ ments, after the determination of such term or
 “ terms, and after demand made and notice in
 “ writing given, for delivering the possession
 “ thereof,

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“ thereof, by his or their landlords or lessors, or
“ the person or persons, to whom the remainder
“ or reversion of such lands, tenements or hereditaments shall belong, his or their agent or
“ agents thereunto lawfully authorized; then
“ and in such case such person or persons, so holding over, shall, for and during the time he,
“ she and they shall so hold over, or keep the
“ person or persons intitled out of possession of
“ the said lands, tenements and hereditaments, as
“ aforesaid, pay to the person or persons so kept
“ out of possession, their executors, administrators
“ or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments
“ so detained, for so long time as the same are
“ detained, to be recovered in any of his majesty’s
“ courts of record, by action of debt, whereunto
“ the defendant or defendants shall be obliged to
“ give special bail; against the recovering of
“ which said penalty there shall be no relief in
“ equity.

“ And whereas great inconveniencies do frequently happen to lessors and landlords in cases
“ of re-entry for non-payment of rent, by reason
“ of the many niceties that attend re-entries at
“ common law; and forasmuch as when a legal
“ re-entry is made, the landlord or lessor must
“ be at the expence, charge and delay of recovering in ejectment, before he can obtain the
“ actual possession of the demised premises; and
“ it often happens, that after such a re-entry
“ made, the lessee or his assignee, upon one or
“ more bills filed in a court of equity, not only
“ hold out the lessor or landlord, by an injunction,
“ from recovering the possession, but likewise,
“ pending

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“ pending the said suit, do run much more in
 “ arrear, without giving any security for rents
 “ due, when the said re-entry was made, or which
 “ shall or do afterwards incur: For remedy
 “ whereof, be it enacted by the authority afore-
 “ said, That in all cases between landlord and
 “ tenant, from and after the twenty-fourth day
 “ of *June* one thousand seven hundred and thirty-
 “ one, as often as it shall happen that one half-
 “ year’s rent shall be in arrear, and the landlord
 “ or lessor, to whom the same is due, hath right
 “ by law to re-enter for the non-payment there-
 “ of, such landlord or lessor shall and may, with-
 “ out any formal demand or re-entry, serve a de-
 “ claration in ejectment for the recovery of the
 “ demised premises; or in case the same cannot
 “ be legally served, or no tenant be in actual pos-
 “ session of the premises, then to affix the same
 “ upon the door of any demised messuage; or in
 “ case such ejectment shall not be for the recovery
 “ of any messuage, then upon some notorious
 “ place of the lands, tenements or hereditaments,
 “ comprised in such declaration in ejectment,
 “ and such affixing shall be deemed legal service
 “ thereof, which service or affixing such declara-
 “ tion in ejectment shall stand in the place and
 “ stead of a demand and re-entry; and in case of
 “ judgment against the casual ejector, or nonsuit
 “ for not confessing lease, entry and *ouster*, it
 “ shall be made appear to the court where the
 “ said suit is depending, by affidavit, or be proved
 “ upon the trial, in case the defendant appears,
 “ that half a year’s rent was due before the said
 “ declaration was served, and that no sufficient
 “ distress was to be found on the demised pre-

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“ misses, countervailing the arrears then due, and
“ that the lessor or lessors in ejectment had
“ power to re-enter; then and in every such case
“ the lessor or lessors in ejectment shall recover
“ judgment and execution, in the same manner
“ as if the rent in arrear had been legally de-
“ manded, and a re-entry made; and in case the
“ lessee or lessees, his, her or their assignee or
“ assignees, or other person or persons, claiming
“ or deriving under the said leases, shall permit
“ and suffer judgment to be had and recovered
“ on such ejectment, and execution to be exe-
“ cuted thereon, without paying the rent and ar-
“ rears, together with full costs, and without
“ filing any bill or bills, for relief in equity, with-
“ in six kalendar months after such execution
“ executed; then and in such case the said lessee
“ or lessees, his, her or their assignee or assignees,
“ and all other persons claiming and deriving un-
“ der the said lease, shall be barred and foreclosed
“ from all relief or remedy in law or equity,
“ other than by writ of error, for reversal of such
“ judgment, in case the same shall be erroneous;
“ and the said landlord or lessor shall from thence-
“ forth hold the said demised premises discharged
“ from such lease; and if on such ejectment ver-
“ dict shall pass for the defendant or defendants,
“ or the plaintiff or plaintiffs shall be nonsuited
“ therein, except for the defendant or defendants
“ not confessing lease, entry and ouster; then in
“ every such case such defendant or defendants
“ shall have and recover his, her and their full
“ costs: Provided always, that nothing herein
“ contained shall extend to bar the right of any
“ mortgagee or mortgagees of such lease, or any
I “ part

“ part thereof, who shall not be in possession, so
 “ as such mortgagee or mortgagees shall and do,
 “ within six kalendar months after such judg-
 “ ment obtained, and execution executed, pay
 “ all rent in arrear, and all costs and damages
 “ sustained by such lessor, person or persons
 “ intitled to the remainder or reversion as afore-
 “ said, and perform all the covenants and agree-
 “ ments, which on the part and behalf of the first
 “ lessee or lessees are and ought to be performed.”

This section of the act prescribes two manners of recovering in an ejectment brought by the landlord: viz. by default, and on trial; in both which, it must be made to appear, “ That half a
 “ year’s rent was due, that there was no sufficient
 “ distress, and that the lessor had power to re-
 “ enter in the former case of judgment against
 “ the casual ejector, (and so also upon nonsuit
 “ on not confessing lease, entry and ouster); this
 “ must be made to appear by affidavit; in the
 “ latter case the same thing must be proved upon
 “ trial. This is a very different case from that of
 “ the defendant in an action for the mesne pro-
 “ fits, not being estopped from going into the
 “ title, by a judgment against the casual ejector
 “ (to which judgment he was a party).” By
 lord chief justice *Mansfield*. *Bur. Rep.* 620.

Ejectment brought by a landlord against his tenant on *Stat. 4 Geo. 2. c. 28. s. 2.* who had judgment against the casual ejector by default, and possession thereupon delivered; near twenty years after which, the tenant brings an ejectment against the same landlord for the same premises: The landlord is not obliged to produce the affidavit. *Bur. Rep.* 615, 617, 618, 619, &c.

“ And

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“ And be it further enacted by the authority
“ aforesaid, That in case the said lessee or lessees,
“ his, her or their assignee or assignees, or other
“ person or persons, claiming any right, title or
“ interest in law or equity, of, in or to the said
“ lease, shall, within the time aforesaid, file one
“ or more bill or bills, for relief in any court of
“ equity, such person or persons shall not have or
“ continue any injunction against the proceedings
“ at law on such ejectment, unless he, she or
“ they do or shall, within forty days next after
“ a full and perfect answer shall be filed by the
“ lessor or lessors of the plaintiff in such ejectment,
“ bring into court, and lodge with the proper
“ officer such sum and sums of money, as the
“ lessor or lessors of the plaintiff in the said eject-
“ ment shall, in his, her or their answer, swear to
“ be due and in arrear, over and above all just al-
“ lowances, and also the costs taxed in the said
“ suit, there to remain till the hearing of the
“ cause, or to be paid out to the lessor or landlord,
“ on good security, subject to the decree of the
“ court; and in case such bill or bills shall be
“ filed within the time aforesaid, and after execu-
“ tion is executed, the lessor or lessors of the
“ plaintiff shall be accountable only for so much,
“ and no more, as he, she or they shall really and
“ *bona fide* without fraud, deceit or wilful neglect,
“ make of the demised premises, from the time
“ of his, her or their entering into the actual pos-
“ session thereof; and if what shall be so made
“ by the lessor or lessors of the plaintiff, happen
“ to be less than the rent reserved on the said
“ lease, then the said lessee or lessees, his, her, or
“ their assignee or assignees, before he, she or they
“ shall

“ shall be restored to his, her their possession or
 “ possessions, shall pay such lessor or lessors, or
 “ landlord or landlords, what the money so by
 “ them made, fell short of the reserved rent, for
 “ the time such lessor or lessors of the plaintiff,
 “ landlord or landlords, held the said lands.

“ Provided always, and be it further enacted
 “ by the authority aforesaid, That if the tenant
 “ or tenants, his, her or their assignee or assignees,
 “ do or shall, at any time before the trial in such
 “ ejectment, pay or tender to the lessor or land-
 “ lord, his executors or administrators, or his, her
 “ or their attorney in that cause, or pay into the
 “ court where the same cause is depending, all
 “ the rent and arrears, together with the costs ;
 “ then and in such case all further proceedings
 “ on the said ejectment shall cease and be discon-
 “ tinued ; and if such lessee or lessees, his, her or
 “ their executors, administrators or assigns, shall,
 “ upon such bill filed as aforesaid, be relieved in
 “ equity, he, she and they shall have, hold and
 “ enjoy the demised lands, according to the lease
 “ thereof made, without any new lease to be there-
 “ of made to him, her or them.

“ And whereas the remedy for recovering
 “ rents-seck, rents of assize and chief rents, are
 “ tedious and difficult, Be it therefore enacted
 “ by the authority aforesaid, That from and
 “ after the twenty-fourth day of *June* one thou-
 “ sand seven hundred and thirty-one, all and
 “ every person or persons, bodies politick and
 “ corporate, shall and may have the like remedy
 “ by distress, and by impounding and selling the
 “ same, in cases of rents seck, rents of assize and
 “ chief rents, which have been duly answered or
 “ paid

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“ paid for the space of three years, within the
“ space of twenty years before the first day of
“ this present session of parliament, or shall be
“ hereafter created, as in case of rent reserved
“ upon lease; any law or usage to the contrary
“ notwithstanding.

“ And whereas many persons hold considerable
“ estates by leases for lives or years, and lease out
“ the same in parcels to several under-tenants;
“ and whereas many of those leases cannot by
“ law be renewed without a surrender of all the
“ under-leases derived out of the same, so that it
“ is in the power of any such under-tenants to
“ prevent or delay the renewing of the principal
“ lease, by refusing to surrender their under-
“ leases, notwithstanding they have covenanted so
“ to do, to the great prejudice of their immediate
“ landlords, the first lessees: For preventing such
“ inconveniences, and for making the renewal of
“ leases more easy for the future, Be it enacted
“ by the authority aforesaid, That in case any
“ lease shall be duly surrendered, in order to be
“ renewed, and a new lease made and executed by
“ the chief landlord or landlords, the same new
“ lease shall, without a surrender of all or any
“ the under-leases, be as good and valid to all
“ intents and purposes, as if all the under-leases
“ derived thereout had been likewise surrendered
“ at or before the taking of such new lease; and
“ all and every person and persons, in whom any
“ estate for life or lives, or for years, shall from
“ time to time be vested by virtue of such new
“ lease, and his, her and their executors and ad-
“ ministrators, shall be intitled to the rents, cove-
“ nants and duties, and have like remedy for

“ recovery thereof, and the under-lessees shall
 “ hold and enjoy the messuages, lands and tene-
 “ ments, in the respective under-leases com-
 “ prised, as if the original leases, out of which
 “ the respective under-leases are derived, had been
 “ still kept on foot and continued; and the chief
 “ landlord and landlords shall have, and be in-
 “ titled to, such and the same remedy, by distress
 “ or entry in and upon the messuages, lands, te-
 “ nements and hereditaments, comprised in any
 “ such under-lease, for the rents and duties re-
 “ served by such new lease, so far as the same
 “ exceed not the rents and duties reserved in the
 “ lease, out of which such under-lease was deri-
 “ ved, as they would have had in case such former
 “ lease had been still continued, or as they would
 “ have had in case the respective under-leases had
 “ been renewed under such new principal lease;
 “ any law, custom or usage to the contrary hereof
 “ notwithstanding.

“ Provided always, That nothing in this act
 “ contained shall extend to that part of *Great*
 “ *Britain* called *Scotland*.”

The end and intent of this act was to limit and
 confine the tenant to six kalendar months, after
 execution executed, for offering compensation, or
 applying for relief in equity. By lord chief justice
Mansfield. *Bur. Rep.* 619, 620, 621.

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The last Acts being found not sufficient to remedy the Inconveniencies that attended Landlords; by an Act of Parliament made 11 Geo. 2. c. 19. intituled, "*An Act for the more effectual securing the Payment of rents, and preventing Frauds by Tenants;*

" I T is enacted, That from and after the
" twenty-fourth day of *June* in the year of
" our Lord one thousand seven hundred and
" thirty-eight, in case any tenant or tenants, les-
" see or lessees for life or lives, term of years, at
" will, sufferance or otherwise, of any messuages,
" lands, tenements or hereditaments, upon the
" demise or holding whereof any rent is or shall
" be reserved, due or made payable, shall fraudu-
" lently or clandestinely convey away or carry
" off or from such premises, his, her or their
" goods or chattels, to prevent the landlord or
" lessor, landlords or lessors, from distraining
" the same for arrears of rent so reserved, due or
" made payable; it shall and may be lawful to
" and for every landlord or lessor, landlords or
" lessors, within that part of *Great Britain* called
" *England*, dominion of *Wales*, or the town of
" *Berwick upon Tweed*, or any person or persons
" by him, her or them for that purpose lawfully
" empowered, within the space of thirty days next
" ensuing such conveying away or carrying off
" such goods or chattels as aforesaid, to take and
" seize such goods and chattels wherever the
" same shall be found, as a distress for the said

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“ arrears of rent ; and the same to sell, or otherwise to dispose of in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords in and upon such premises for such arrears of rent ; any law, custom or usage to the contrary in any wise notwithstanding.

“ Provided always, That no landlord or lessor, or other person intitled to such arrears of rent, shall take or seise any such goods or chattels as a distress for the same, which shall be sold *bona fide*, and for a valuable consideration, before such seisure made, to any person or persons not privy to such fraud as aforesaid ; any thing herein contained to the contrary notwithstanding.

“ It is further enacted, That from and after the said twenty-fourth day of *June*, if any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same ; all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid, to be recovered by action of debt in any of his majesty's courts of record at *Westminster*, or in the courts of session in the counties palatine of *Chester*, *Lancaster* or *Dur-*

“ *ham*

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“ *ham* respectively, or in the courts of grand sessions in *Wales*; wherein no essoin, protection or wager of law shall be allowed, nor more than one imparlance.

“ It is also enacted, That where the goods and chattels so fraudulently carried off or concealed, shall not exceed the value of fifty pounds, it shall and may be lawful for the landlord or landlords, from whose estate such goods or chattels were removed, his, her or their bailiffs, servant or agent, in his, her or their behalf, to exhibit a complaint in writing against such offender or offenders before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact and all proper witnesses upon oath, or if any such witnesses be one of the people called *quakers*, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged; and to inquire in like manner of the value of the goods and chattels by him, her or them respectively so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of peace may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her or their bailiff,

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“ servant or agent, at such time as the said justices
“ shall appoint: And in case the offender or of-
“ fenders having notice of such order, shall re-
“ fuse or neglect so to do, may and shall, by
“ warrant under their hands and seals, levy the
“ same by distress and sale of the goods and chat-
“ tels of the offender or offenders; and for want
“ of such distress may commit the offender or of-
“ fenders to the house of correction, there to be
“ kept to hard labour, without bail or mainprize,
“ for the space of six months, unless the money
“ so ordered to be paid, as aforesaid, shall be
“ sooner satisfied.

“ Provided also, That it shall and may be
“ lawful for any person, who thinks himself ag-
“ grieved by such order of the said two justices,
“ to appeal to the justices of peace at their next
“ general or quarter-sessions to be held for the
“ same county, riding or division of such county,
“ who may and shall hear and determine such
“ appeal, and give such costs to either party as
“ they shall think reasonable, whose determina-
“ tion therein shall be final.

“ Provided also, That where the party appeal-
“ ing shall enter into a recognizance with one or
“ two sufficient surety or sureties, in double the
“ sum so ordered to be paid, with condition to
“ appear at such general or quarter-sessions, the
“ order of the said two justices shall not be exe-
“ cuted against him in the mean time.

“ And it is further enacted, That where any
“ goods or chattels fraudulently or clandestinely
“ conveyed or carried away by any tenant or
“ tenants, lessee or lessees, his, her or their ser-
“ vant or servants, agent or agents, or other per-
“ son

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“ son or persons aiding or assisting therein, shall
“ be put, placed or kept in any house, barn,
“ stable, out-house, yard, close, or place locked
“ up, fastened or otherwise secured, so as to pre-
“ vent such goods or chattels from being taken
“ and seised as a distress for arrears of rent; it
“ shall and may be lawful for the landlord or land-
“ lords, lessor or lessors, his, her or their steward,
“ bailiff, receiver or other person or persons im-
“ powered, to take and seise, as a distress for rent,
“ such goods and chattels (first calling to his,
“ her or their assistance, the constable, head-
“ borough, borsholder, or other peace-officer of
“ the hundred, borough, parish, district or place
“ where the same shall be suspected to be con-
“ cealed, who are hereby required to aid and
“ assist therein; and in case of a dwelling-house,
“ oath being also first made before some justice of
“ the peace of a reasonable ground to suspect that
“ such goods or chattels are therein) in the day-
“ time to break open and enter into such house,
“ barn, stable, out-house, yard, close and place;
“ and to take and seise such goods and chattels
“ for the said arrears of rent, as he, she or they
“ might have done by virtue of this or any former
“ act, if such goods and chattels had been put in
“ any open field or place.

“ And it is further enacted, That from and
“ after the said twenty-fourth day of June, which
“ shall be in the year of our Lord one thousand
“ seven hundred and thirty-eight, it shall and
“ may be lawful to and for every lessor or land-
“ lord, lessors or landlords, or his, her or their
“ steward, bailiff, receiver, or other persons im-
“ powered by him, her or them, to take and seise,

“ as a distress for arrears of rent, any cattle or
 “ stock of their respective tenant or tenants,
 “ feeding or depasturing upon any common, ap-
 “ pendant or appurtenant, or any ways belong-
 “ ing to all or any part of the premises demised
 “ or holden; and also to take and seise all sorts
 “ of corn and grass, hops, roots, fruits, pulse, or
 “ other product whatsoever, which shall be grow-
 “ ing on any part of the estates so demised or
 “ holden, as a distress for arrears of rent; and
 “ the same to cut, gather, make, cure, carry and
 “ lay up, when ripe, in the barns or other pro-
 “ per place on the premises so demised or holden;
 “ and in case there shall be no barn or proper
 “ place on the premises so demised or holden,
 “ then in any other barn or proper place which
 “ such lessor or landlord, lessors or landlords shall
 “ hire, or otherwise procure for that purpose,
 “ and as near as may be to the premises; and
 “ in convenient time to appraise, sell, or other-
 “ wise dispose of the same, towards satisfaction of
 “ the rent for which such distress shall have been
 “ taken, and of the charges of such distress, ap-
 “ praisement and sale, in the same manner as
 “ other goods and chattels may be seised, distrain-
 “ ed and disposed of; and the appraisement
 “ thereof to be taken when cut, gathered, cured
 “ and made, and not before.

“ Provided always, That notice of the place
 “ where the goods and chattels so distrained shall
 “ be lodged or deposited, shall, within the space
 “ of one week after the lodging or depositing
 “ thereof in such place, be given to such lessee or
 “ tenant, or left at the last place of his or her
 “ abode; and that if after any distress for arrears

“ of

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“ of rent so taken, of corn, grass, hops, roots,
“ fruits, pulse, or other product which shall be
“ growing as aforesaid, and any time before the
“ same shall be ripe and cut, cured or gathered,
“ the tenant or lessee, his or her executors, ad-
“ ministrators or assigns, shall pay, or cause to be
“ paid to the lessor or landlord, lessors or land-
“ lords, for whom such distress shall be taken, or
“ to the steward or other person usually employ-
“ ed to receive the rent of such lessor or lessors,
“ landlord or landlords, the whole rent which
“ shall be then in arrear, together with the full
“ costs and charges of making such distress, and
“ which shall have been occasioned thereby;
“ that then, and upon such payment, or lawful
“ tender thereof actually made, whereby the end
“ of such distress will be fully answered, the same
“ and every part thereof shall cease; and the corn,
“ grass, hops, roots, fruits, pulse, or other pro-
“ duct so distrained, shall be delivered up to the
“ lessee or tenant, his or her executors, admini-
“ strators or assigns; any thing herein before
“ contained to the contrary notwithstanding.

“ And it is also enacted, That from and after
“ the said twenty-fourth day of *June* one thou-
“ sand seven hundred and thirty-eight, it shall
“ and may be lawful to and for any person or per-
“ sons lawfully taking any distress for any kind of
“ rent, to impound or otherwise secure the dis-
“ tress so made, of what nature or kind soever it
“ may be, in such place, or on such part of the
“ premises chargeable with the rent, as shall be
“ most fit and convenient for the impounding
“ and securing such distress; and to appraise,
“ sell and dispose of the same upon the premises,
“ in

“ in like manner, and under the like directions
 “ and restraints to all intents and purposes, as
 “ any person taking a distress for rent may now
 “ do off the premises, by virtue of an act made
 “ in the second year of the reign of king *William*
 “ and queen *Mary*, intituled, *An act for enabling*
 “ *the sale of goods distrained for rent, in case the*
 “ *rent be not paid in a reasonable time; or of one*
 “ other act made in the fourth year of his present
 “ majesty, intituled, *An act for the more effectual*
 “ *preventing frauds committed by tenants, and for the*
 “ *more easy recovery of rents and renewal of leases;*
 “ and that it shall and may be lawful to and for
 “ any person or persons whatsoever, to come and
 “ go to and from such place or part of the said
 “ premises, where any distress for rent shall be
 “ impounded and secured, as aforesaid, in order
 “ to view, appraise and buy, and also in order to
 “ carry off or remove the same, on account of
 “ the purchaser thereof; and that if any pound-
 “ breach or rescous shall be made of any goods
 “ and chattels, or stock distrained for rent, and
 “ impounded, or otherwise secured by virtue of
 “ this act, the person or persons aggrieved there-
 “ by shall have the like remedy, as in cases of
 “ pound-breach, or rescous, is given and provided
 “ by the said statute.

“ It is also enacted, That from and after the
 “ said twenty-fourth day of *June* in the year of
 “ our Lord one thousand seven hundred and
 “ thirty-eight, all and every attornment and at-
 “ tornments of any tenant or tenants of any
 “ messuages, lands, tenements or hereditaments,
 “ within that part of *Great Britain* called *England*,
 “ dominion of *Wales*, or town of *Berwick upon*
 “ *Tweed*,

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“ *Tweed*, shall be absolutely null and void to all
“ intents and purposes whatsoever ; and the pos-
“ session of their respective landlord or landlords,
“ lessor or lessors, shall not be deemed or con-
“ strued to be any wise charged, altered or affected
“ by any such attornment or attornments : Pro-
“ vided always, That nothing herein contained
“ shall extend to vacate or affect any attornment
“ made pursuant to, and in consequence of some
“ judgment at law, or decree or order of a court
“ of equity, or made with the privity and consent
“ of the landlord or landlords, lessor or lessors, or
“ to any mortgagee, after the mortgage is be-
“ come forfeited.

“ It is also further enacted, That from and
“ after the said twenty-fourth day of *June* one
“ thousand seven hundred and thirty-eight, every
“ tenant, to whom any declaration in ejectment
“ shall be delivered for any lands, tenements or
“ hereditaments, in that part of *Great Britain*
“ called *England*, dominion of *Wales*, or town of
“ *Berwick upon Tweed*, shall forthwith give notice
“ thereof to his or her landlord or landlords, or
“ his, her or their bailiff or receiver, under penal-
“ ty of forfeiting the value of three years improved
“ or rack-rent of the premises so demised or
“ holden in the possession of such tenant, to the
“ person of whom he or she holds ; to be re-
“ covered by action of debt, to be brought in
“ any of his majesty’s courts of record at *West-*
“ *minster*, or in the counties palatine of *Ches-ter*,
“ *Lancaster* and *Durham*, respectively, or in the
“ courts of grand sessions in *Wales* ; wherein no
“ essoin, protection or wager of law shall be al-
“ lowed, nor any more than one imparlance.

“ And

“ And it is further enacted, That it shall and
 “ may be lawful for the court, where such eject-
 “ ment shall be brought, to suffer the landlord or
 “ landlords to make him, her or themselves de-
 “ fendant of defendants, by joining with the te-
 “ nant or tenants, to whom such declaration in
 “ ejectment shall be delivered, in case he or they
 “ shall appear ; but in case such tenant or tenants
 “ shall refuse or neglect to appear, judgment shall
 “ be signed against the casual ejector for want of
 “ such appearance ; but if the landlord or land-
 “ lords of any part of the lands, tenements or he-
 “ reditaments, for which such ejectment was
 “ brought, shall desire to appear by himself or
 “ themselves, and consent to enter into the like
 “ rule, that, by the course of the court, the te-
 “ nant in possession, in case he or she had ap-
 “ peared, ought to have done ; then the court,
 “ where such ejectment shall be brought, shall and
 “ may permit such landlord or landlords so to do,
 “ and order a stay of execution upon such judg-
 “ ment against the casual ejector, until they shall
 “ make further order therein.

A landlord was made defendant, according to
 this clause of the statute, on the tenant's non-
 appearance, and entered into the common rule ;
 and thereupon a stay of execution against the
 casual ejector was ordered until the court should
 make further order. A writ of error brought by
 the landlord, is a sufficient reason against taking
 out execution ; but the proper opportunity for
 the landlord to make his stand against the execu-
 tion, is by shewing this as cause against the plain-
 tiff's motion for leave to take it out ; if he omits
 this opportunity, the execution (regularly issued)
 shall

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shall not be set aside. By lord *Mansfield*. 2 *Bur. Rep.* 757.

“ And to obviate some difficulties that many
“ times occur in the recovery of rents, where the
“ demises are not by deed, it is further enacted,
“ That from and after the said twenty-fourth
“ day of *June* it shall and may be lawful to and
“ for the landlord or landlords, where the agree-
“ ment is not by deed, to recover a reasonable
“ satisfaction for the lands, tenements or heredita-
“ ments, held or occupied by the defendant or
“ defendants, in an action on the case, for the
“ use and occupation of what was so held or en-
“ joyed; and if in evidence on the trial of such
“ action any parol demise, or any agreement
“ (not being by deed) whereon a certain rent
“ was reserved, shall appear, the plaintiff in
“ such action shall not therefore be nonsuited,
“ but may make use thereof as an evidence of the
“ *quantum* of the damages to be recovered.

“ It is enacted, That from and after the twen-
“ ty-fourth day of *June* one thousand seven hun-
“ dred and thirty-eight, where any tenant for
“ life shall happen to die before or on the day on
“ which any rent was reserved, or made payable
“ upon any demise or lease of any lands, tene-
“ ments or hereditaments, which determined on
“ the death of such tenant for life, that the exe-
“ cutors or administrators of such tenant for life
“ shall and may, in an action on the case, recover
“ of and from such under-tenant or under-
“ tenants of such lands, tenements or heredita-
“ ments, if such tenant for life die on the day on
“ which the same was made payable, the whole,
“ or if before such day, then a proportion of such
“ rent,

“ rent, according to the time such tenant for life
 “ lived of the last year, or quarter of a year, or
 “ other time in which the said rent was growing
 “ due, as aforesaid, making all just allowances or
 “ a proportionable part thereof respectively.

“ And it is further enacted, That from and
 “ after the said twenty-fourth day of *June* one
 “ thousand seven hundred and thirty-eight, if any
 “ tenant holding any lands, tenements or here-
 “ ditaments, at a rack-rent, or where the rent re-
 “ served shall be full three fourths of the yearly
 “ value of the demised premises, who shall be
 “ in arrear for one year's rent, shall desert
 “ the demised premises, and leave the same un-
 “ cultivated or unoccupied, so as no sufficient
 “ distress can be had to countervail the arrears of
 “ rent; it shall and may be lawful to and for two
 “ or more justices of the peace of the county,
 “ riding, division or place, (having no interest in
 “ the demised premises) at the request of the
 “ lessor or landlord, lessors or landlords, or his,
 “ her or their bailiff or receiver, to go upon and
 “ view the same, and to affix, or cause to be af-
 “ fixed on the most notorious part of the pre-
 “ mises, notice in writing, what day (at the dis-
 “ tance of fourteen days at least) they will return
 “ to take a second view thereof; and if upon
 “ such second view the tenant, or some person on
 “ his or her behalf, shall not appear and pay the
 “ rent in arrear, or there shall not be sufficient
 “ distress upon the premises; then the said
 “ justices may put the landlord or landlords, lessor
 “ or lessors, into the possession of the said demised
 “ premises; and the lease thereof to such tenant,
 “ as

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“ as to any demise therein contained only, shall
“ from thenceforth become void.

“ Provided always, That such proceedings of
“ the said justices shall be examinable in a sum-
“ mary way by the next justice or justices of as-
“ size of the respective counties, in which such
“ lands or premises lie; and if they lie in the
“ city of *London* or county of *Middlesex*, by the
“ judges of the courts of King’s bench or Com-
“ mon Pleas; and if in the counties palatine of
“ *Chester*, *Lancaster*, or *Durham*, then before the
“ judges thereof; and if in *Wales*, then before
“ the courts of grand sessions respectively, who
“ are hereby respectively empowered to order
“ restitution to be made to such tenant, together
“ with his or her expences and costs, to be paid
“ by the lessor or landlord, lessors or landlords,
“ if they shall see cause for the same; and, in
“ case they shall affirm the act of the said justices,
“ to award costs, not exceeding five pounds, for
“ the frivolous appeal.

“ And it is further enacted, That from and
“ after the said twenty-fourth day of *June* one
“ thousand seven hundred and thirty-eight, in
“ case any tenant or tenants shall give notice of
“ his, her or their intention to quit the premises,
“ by him, her or them holden, at a time men-
“ tioned in such notice, and shall not accordingly
“ deliver up the possession thereof at the time in
“ such notice contained, that then the said te-
“ nant or tenants, his, her or their executors or
“ administrators, shall from thenceforward pay to
“ the landlord or landlords, lessor or lessors,
“ double the rent or sum which he, she or they
“ should otherwise have paid; to be levied, sued
“ for,

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“ for, and recovered at the same time, and in the
 “ same manner, as the single rent or sum, before
 “ the giving such notice, could be levied, sued
 “ for, or recovered; and such double rent or sum
 “ shall continue to be paid during all the time
 “ such tenant or tenants shall continue in pos-
 “ session as aforesaid.

“ And it is enacted, That from and after the
 “ said twenty-fourth day of *June* in the year of
 “ our Lord one thousand seven hundred and
 “ thirty-eight, where any distress shall be made
 “ for any kind of rent justly due, and any irregu-
 “ larity or unlawful act shall be afterwards done
 “ by the party or parties distraining, or by his,
 “ her or their agents, the distress itself shall not
 “ be therefore deemed to be unlawful, nor the
 “ party or parties making it be deemed a tres-
 “ passer or trespassers *ab initio*; but the party or
 “ parties aggrieved by such unlawful act or irregu-
 “ larity, shall or may recover full satisfaction
 “ for the special damage he, she or they shall have
 “ sustained thereby, and no more, in an action
 “ of trespass, or on the case, at the election
 “ of the plaintiff or plaintiffs: Provided always,
 “ That where the plaintiff or plaintiffs shall re-
 “ cover in such action, he, she or they shall be
 “ paid his, her or their full costs of suit, and have
 “ all the like remedies for the same, as in other
 “ cases of costs.

“ Provided nevertheless, That no tenant or
 “ tenants, lessee or lessees, shall recover in any
 “ action for any such unlawful act or irregularity
 “ as aforesaid, if tender of amends hath been
 “ made by the party or parties distraining, his,
 “ her or their agent or agents, before such action
 “ brought.

“ And

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“ And it is further enacted, That from and
“ after the twenty-fourth day of *June* one thousand
“ seven hundred and thirty-eight, in all actions
“ of trespass, or upon the case, to be brought
“ against any person or persons intitled to rents
“ or services of any kind, his, her or their bailiff
“ or receiver, or other person or persons, relating
“ to any entry, by virtue of this act, or other-
“ wise, upon the premisses chargeable with such
“ rents or services, or to any distress or seizure,
“ sale or disposal of any goods or chattels there-
“ upon; it shall and may be lawful to and for
“ the defendant or defendants in such actions to
“ plead the general issue, and give the special
“ matter in evidence; any law or usage to the
“ contrary notwithstanding: And in case the
“ plaintiff or plaintiffs in such actions shall be-
“ come nonsuit, discontinue his, her or their ac-
“ tion, or have judgment against him, her or
“ them, the defendant or defendants shall recover
“ double costs of suit.”

Trespass for breaking his close with cattle, &c.
As to all the trespass except with one hog, Not
guilty; and in bar to that, That the plaintiff
distrained the hog *damage-feasant*, and impounded
it in the common pound of the manor, *nomine
disfrictionis*, &c. Replication confessed the distress
and impounding, and that the hog without the
assent of the plaintiff escaped out of the pound,
the plaintiff *adtunc nec adhuc* not being satisfied for
the said damage. To this defendant demurred.
Judgment for defendant by three judges against
one, because it did not appear that the hog escaped
by default of the defendant, for perhaps it escaped
by

by a fault in the pound; and it would be very hard that the defendant should lose his pig, and also make other satisfaction to the plaintiff for the damage done by it. *Vide* the arguments there that distress is only in nature of a pledge, and upon tender of full satisfaction, though after *Withernam* or return irrepleviable, must be restored, or else detainee lies for it. *Lord Raym.* 719, 720. 11 *Mod.* 21. 12 *Mod.* 660. *Vasper v. Eddowes.*

A distress for rent cannot be in the night, otherwise for *damage-feasant*, lest the beasts should escape before they are taken.

Covenant for non-payment of a year's rent from *Michaelmas* 1725 to *Michaelmas* 1726. The defendant craved *oyer* of the lease, in which there is a covenant on the part of the lessee to repair, except the premises shall be demolished by fire: And then pleads, that before *Michaelmas* 1725 the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole year for which the rent is demanded, nor had he any enjoyment of the premises; and therefore prays judgment if he shall be charged with the rent. To this plaintiff demurred; and it was insisted on, that whatever might be the default of the plaintiff in not repairing, yet the defendant must in all events perform his covenant to pay his rent; and *Aleyn* 27 was cited, and the court said that the case in *Aleyn* 27 was express. If the defendant has any injury he will have his remedy; but he cannot set it off against the demand for rent. The plaintiff must have judgment. *E.* 13 *Geo.* 1. *Monk v. Cooper*, *Str.* 763. 2 *Lord Raym.* 1477.

In

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In trespass for taking goods the defendant justifies, that he demised some tenements to the plaintiff for one term, and others for another term, and there being rent arrear on both demises, he distrained the goods. And on demurrer it was held ill, for these being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents, and no distress on one part can be good for both rents. The plaintiff had judgment. *E. 9 Geo. 2. Rogers v. Birkmire, Str. 1040.*

C H A P. V.

Of Rescous, in what Cases it may be lawful : Of Replevins, how they may be sued out ; and of Avowries to Declarations upon Replevins.

THE word or term *rescous* is derived from an old Norman verb *rescourer*, which is in the Latin *recuperare*, that is, to take from, to get again, or recover : So that *rescue* is as much as to say, to recover or get again what another hath taken away. *Co. Lit. 160.*

And in the sense of the law, *rescous* is taking away or setting at liberty goods distrained, or the body of a person arrested, and in an officer's custody by virtue of legal process.

Such kinds of *rescous* as appertain unto our present subject, are of distresses taken ; and we are therein

therein to consider in what cases it may be justifiable to *rescue* goods or cattle distrained, and where not.

If a landlord distrain when there is no rent due, the tenant may make a *rescue*, and hinder that distress. *Co. Lit.* 4. 11.

In like manner, if a landlord come to distrain, and the tenant tender his rent unto him, and the lord will distrain notwithstanding; in this case the tenant may make *rescous*. *1 Inst.* 160.

If rent be in arrear, and the lord distrain the tenant's cattle in the highway within his fee; here also the tenant may *rescue* them, for no man may distrain in the highway but the king, and his officers by special authority. *Coke, Ibid. Magna Charta, f. 25.*

In like manner, if a landlord distrain *averia caruæ*, [goods of the plough,] where there is a sufficient distress to be taken besides; or if the lord distrain any thing that is not distrainable by common law or statute; in this case it is lawful for the tenant to make *rescue*. *Ibid. f. 112. Rastal, Tit. Distress* 10.

But if a lord come to distrain cattle which he fees within his fee, and the tenant or any others, to prevent the distress, drive the cattle away out of the fee, the lord may follow them with fresh suit; and distrain the cattle; and the tenant cannot justify a *rescous* of them, because in the judgment of the law the distress is taken within his fee. *Hugh's Grand Abridgment, 1 Part, p. 217. C. 21.*

But if the lord be coming to distrain, and have not sight of the cattle within his fee, though the tenant drive them off on purpose, or if the cattle
after

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after the view go out of the fee of their own accord, or if the tenant after the view removeth them for any other cause than to prevent the distress; then if the lord distrain them out of his fee, the tenant may justify a *rescue*. *Co. 1 Par. Inst. fol. 161.*

If the lord distrain out of his fee in lands not holden of him, the tenant may make *rescous*, unless in the cases aforesaid. *Co. Lit. 161. a.*

If *rescous* be returned without shewing the place where *rescous* was made, it is void. *Mod. Rep. 112. pl. 562.*

If a man come to distrain cattle *damage-feasant*, and see the beasts in his ground, and the owner of the cattle drives them out before the distress taken; the owner of the ground cannot follow and take them, for if he do, the owner of the cattle may rescue them, for they must be *damage-feasant*; that is, doing hurt at the time of the distress taken, and the owner of the ground may bring his action of trespass. *Co. Lit. 161. a.*

The lord cannot break open any gate that is locked, nor break open any inclosure to take a distress: So that if a tenant lock up his gates, and inclose his ground, so that the lord cannot come to distrain, if the rent be behind, and the lord have had actual possession, this is a disseisin. *Coke, -Ibid.* But see the late acts.

Of Replevins.

A replevin (*replegiare* is compounded of *re* and *plegiare*, viz. to re-deliver upon pledges or sureties) is grounded and granted upon a distress, and is a re-deliverance of it, that the thing distrained

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may

may remain with the first possessor, upon security given by him, to try the right with the detainer, and to answer in a course of law.

Goods may be replevied two manner of ways, viz. By writ, which is by common law; or by plaint in the sheriff's court, which is by the statute: And the sheriff ought to take two sorts of pledges; one by the common law, viz. *Plegii de prosequendo*; and another by the statute, viz. *Plegii de retorno habendo*. And the party desiring of it, and giving such security as is by law required, shall upon any distress made for rent, or otherwise, have his replevin. See *Co. Lit.* 145. b.

For the ease and speedy remedy of the country, in case of distresses where the cattle be pounded, the statute hath provided, That every sheriff at his own county-day, or within two months after he first receives his patent, is to depute and proclaim in his shire-town four deputies to make replevins within his county, which must reside within twelve miles one of another; on pain of five pounds a month for every month they are wanting.

So that when any man's goods are distrained or impounded, he may repair to one of these sheriff's deputies for that purpose; and there he may have a replevin (upon *Plegii de retorn' habend' si, &c.*) to cause the goods distrained to be delivered to the owner.

By the writ *de replegiari facias* which is at the common law, the sheriff is commanded, taking the pledges of prosecution, to re-deliver the goods distrained to the owner: But since the other, viz. by plaint in the sheriff's court, is the readier and easier way, this writ is out of fashion.

In

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In a replevin, he whose goods are distrained or impounded becomes the plaintiff, and declares against the other for unjustly taking and detaining his goods or cattle *contra vad' & pledg', &c.*

If a landlord distrain, and carry the distress to hold, or out of the county, so that the sheriff upon a replevin cannot re-deliver the goods, then, upon the sheriff's return of the replevin, tenants may have a writ of *withernam* directed to the sheriff, to take as many of the lord's beasts, or as much goods in his keeping, till he have made deliverance of the first distress; and if the goods or cattle be conveyed to a fort or castle, the sheriff may command the power of the county, and beat it down. *Rastal, Tit. Distress 7.*

If a distress be made in a franchise or bailiwick, the sheriff is to direct his replevin to the bailiff thereof to deliver them upon pledges, &c.

And if he make no answer, or return that he will make no deliverance, or the like, then the sheriff may enter into the liberty and make deliverance; and if the distress was taken without the liberty, and impounded within the liberty, then the sheriff may enter and make deliverance, and need not first to make out a warrant to the bailiff of the liberty. *Stat. Marlebr. c. 21, Westm. 1. c. 17. 2 Co. Inst. 140, 194.*

The plaintiff in the replevin ought to have the property of the goods in him at the time of the distress made; for if the defendant claim property, the sheriff cannot replevy the distress, but the property must be tried by writ *de proprietate probanda*.

So that if the defendant claim property in the goods distrained, then must the plaintiff in the replevin

plevin have a writ *de proprietate probanda*, directed to the sheriff to try the property; and if the jury find for the plaintiff, then the defendant must make deliverance of the distress: And if it pass for the defendant, the sheriff can proceed no further unless the plaintiff bring a writ of *replegiari facias* directed to the sheriff, and then though he do return the property, yet it shall proceed to trial in the Common Pleas upon the issue of the property. *Co. Lit.* 145.

And it is noted, That there are two kinds of property; that is, a general property, which every absolute owner hath; and a special property, as of goods pledged or taken to manure one's land, and the like; and of both these a replevin doth lie. *Co. Lit.* 145. *b.*

But a man cannot claim property by his bailiff or servant.

The defendant in a replevin, that is, he that made the distress, may, if he see cause, bring a writ of *recordare*, and so remove the plaint upon the replevin out of the sheriff's county court into the Common Pleas; and if the plaintiff declare not, he may have a *return' habend'*. And then if he declare not, a writ to inquire of damages. 2 *Co. Inst.* 339.

And if a replevin be depending by writ out of chancery, the plaintiff or defendant may remove the plea by a *pone*; and if the plea be depending in the county, the plaintiff may remove the same without cause; but the defendant cannot move the same without cause, which must be inserted in the end of the writ. 2 *Co. Inst.* 339. *Reg. Orig.* 34. *F. N. B.* 69.

If

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If a man by his deed grant a rent with a clause of distress, and grant further that he shall keep the goods distrained against sureties and pledges till the rent be paid; this grant is not good, but the sheriff may replevy the goods distrained notwithstanding: For if such a distress should be irrepleviable, the current of replevins would be stopped, to the great damage of the subject.

If the goods or cattle of several men be distrained, they cannot join in a replevin, but every man must have a several replevin; for in a replevin it is a good plea to say, the property is to the plaintiff and to a stranger; and where there be two plaintiffs, that the property is to one of them. *Co. Lit.* 145.

If a man take a distress in one county, and drive it into another, the owner of the cattle may sue a replevin in which county he pleaseth, *Comp. Att.* 131.

In a replevin, if it be of two cattle, one living, the other dead, the living shall be first demanded. *Finch, l. 1. c. 3. p. 25.*

If the cattle of a *feme sole* be taken, and afterwards she taketh a husband, he alone may sue a replevin. *Ibid.*

If the plaintiff in replevin do not set out the place where the distress is taken as well as the town, his declaration will be nought, and the avowment may overthrow him upon a demurrer. *Hob. Rep.* 16. *int' Read and Hawkes.*

If a lord distrain his tenant wrongfully, altho' the cattle be come back again to the owner, yet the tenant may have a replevin against the lord, because he cannot have an action of trespass against him.

The plaintiff in a replevin ought to be careful in giving his instructions for it, for it must be certain in setting down the number and kinds of the cattle which are distrained, otherwise the replevin is not good.

The *avowant* is the defendant in a replevin; that is, he that made the distress; and when he justifies in his plea for what cause he distrained, that plea is called his *avowry*.

As if a landlord distrains for rent in arrear, and the tenant or owner of the cattle brings a replevin, and declares against him for unjustly taking and detaining his cattle, and the defendant justifies he took it in his own right, and so shewing the cause of his taking in his plea; this is an *avowry*.

But if the defendant took the distress for or in the right of another, then, when he hath shewed the cause in his plea, he must make the *confessance* or acknowledgment of the taking the distress, as being bailiff or servant unto him in whose right he took it.

The court granted an attachment against the under-sheriff of *Cumberland*, for granting a replevin of goods distrained on a conviction for deer-stealing. *E. 16 Geo. 2. Dominus Rex v. Monkhouse*, in *B. R. Str.* 1184.

Replevin in *London*, defendant appears upon an *elengata*, plaintiff declares for taking guns in *quodam loco vocat'* the *Minories* in *London*; defendant pleaded *Non cepit modo et forma*. At the trial the plaintiff proved the taking at *Rotherhithe* in *Surry*; upon which it was objected, that the plaintiff had not proved his issue, for the place is material, and therefore part of the issue under *modo et forma*. The counsel for the plaintiff admitted

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mitted that it was traversable, but insisted that by not traversing it particularly, the place was admitted, and could not be insisted on upon *non cepit*. But chief justice *Pratt* held, that where the plaintiff avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon plaintiff was nonsuit. *Hil. 8 Geo. 1. Johnson v. Wollyer, at Guildball coram Pratt, C. J. Str. 507.*

There are four manners of avowries which a lord may make upon a replevin:

1. Avowry upon his very tenant. *Co. Lit. 9. f. 135, 136.*
2. Upon his very tenant by the manor where the tenant had but a particular estate.
3. Upon his tenant by the manor where the lord had but a particular estate; and these three are avowries at the common law.
4. The lord may avow upon the matter in the land as within his fee: This is provided by *Stat. 21 H. 8. c. 19.* and is the safest way for the benefit of the lord; for by this statute the lord may avow the taking a distress, as in lands holden of him within his fee, without naming of any person in certain; which by the common law they could not do, but were thereby compelled to avow upon a person in certain, which often proved much to their damage and prejudice: For by the secret fines, recoveries, grants and conveyances, which the tenants used purposely to frame to defraud their lords, they were ignorant upon whom to

make their legal avowry ; which inconveniencies the forementioned statute hath prevented.

Now in an avowry upon this statute, the plaintiff in the replevin, be he tenant for years or otherwise, may have every sufficient answer and aid, and every other advantage in the law to the avowry, disclaims only excepted ; for because the avowry is made upon no certain person, he cannot disclaim.

And if such plaintiffs be nonsuit or barred, or overthrown by the avowry, then the defendant or avowant shall recover costs and damages against the plaintiff, as the plaintiff should have done, if he had recovered in the replevin against the avowant.

If any avowry is made for rent, and it appears by the party's own shewing that part of it is not yet due, yet the avowry may be good for the residue. *1 Saund. 385.*

But if it appears, that an avowant has title only to two parts of the rent, for which he avows, the whole avowry shall abate. *Idem 286.*

Also in an avowry for rent, and *nomine pœnæ* together, without alledging any demand of rent, the avowry is good for the rent, although it is ill for the penalty. *Ibid.*

Avowry for rent due at a later day, is not a bar in avowry for rent due at a former day ; neither is a recovery in debt for rent due at a later day, a bar in debt for rent due at a former day, as an acquittance is. *1 Lev. 43.*

In replevin, the defendant pleaded they were the beasts of a stranger ; whereupon the plaintiff demurred, because it was only a plea in abatement. The court said, It was good either in bar or abatement,

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ment, and that there needed no avowry for a return, because the beasts being not the plaintiff's, the avowant is to have the return; and the judgment was given for the defendant. 2 Lev. 92. See before, Stat. 17 Car. 2. at the end of Chap. IV.

If a tenant hath rent behind for divers years, and makes a feoffment in fee, and the lord accept the rent or service of the feoffee due in his time, he shall lose the arrearages of his rent due in the time of the feoffor: For after such acceptance, the lord cannot avow upon the feoffor, nor upon the feoffee, for the arrearages due in the time of the feoffor; but if the feoffor dieth, although the lord accept the rent or service by the hands of the feoffee due in his time, yet he shall not lose the arrearages, because he is now by the law compelled to avow upon the feoffee; and what the law enjoins him to, shall not be prejudicial unto him.

If the plaintiff in a replevin be nonsuit, or otherwise by avowry barred or overthrown; then the defendant or avowant shall recover costs and damages against the plaintiff, as the plaintiff should have done or had, if he had recovered in the replevin against the avowant. See before, Chap. IV.

Defendant in replevin may plead *property* in a stranger either in bar or abatement. And where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry; but where the plea in abatement is to the point of the action as *property* is, the defendant shall have a return without avowry: For whether the property be in the defendant or a stranger, the

defendant ought to have a return, because he had the possession which was illegally taken from him by the replevin, when the plaintiff had no right. *Hil. 4 W. & M. Butcher v. Porter*, in *B. R. Salk. 94. Lord Raym. 217.*

Error of a judgment in *C. B.* in replevin, for cattle taken the 26 *Sept.* The defendant avowed the taking as a distress for rent reserved on a lease for years, which was made under the title of *Christopher* late duke of *Albemarle*, and for the rent of two years and an half, ending at *Michaelmas 29 Sept. &c.* he avowed. And this was now assigned for error; for the distress was made before *Michaelmas*, when the rent was in arrear; and notwithstanding that, it was urged by *Mountague*, That the distress was well made for the rent of two years; yet the court without difficulty reversed the judgment; for the avowry is for one entire rent, and the judgment accordingly; but before judgment, the avowant might have abated his own avowry for the half-year, and prayed judgment for the residue, and this would have been good. Judgment reversed *nisi causa*. But afterwards the record was amended in *C. B. Mich. 9 W. 3. Richards and Cornesford*, in *B. R. Comyns's Rep. 42. pl. 26. Lord Raym. 255.*

Plaintiff in replevin declares for taking of his cattle in a certain place called *B.* The defendant pleads in abatement, That he took them in a certain place called *C. Absque hoc, quod cepit in præd' loco vocat' B. prout, &c.* and *pro returno habendo* he avows, &c. The plaintiff confessed the caption to be in *C.* and thereupon the avowant had judgment, that the writ should abate, and for the return of the cattle. On a motion that the avowant

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might

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might have his costs, it was resolved by the court, that he should not; for the statute of 21 H. 8. c. 19. does not extend to this case, but gives costs only when the plaintiff is *non-suited*; and the Stat. 7 H. 8. c. 4. gives costs only when the plaintiff is barred; but here the plaintiff is neither barred nor nonsuited, but the writ only abates; and he may have a new writ, and is not put to his second deliverance. T. 1 Ann. Smith and Walgrave, in B. R. in *Replevin*, Comyns's Rep. 122. pl. 85. 2 Lord Raym.

Sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff: Trespass for taking two bullocks, &c. of the plaintiff. The defendant Davies, as to all but the taking the said bullocks, pleads Not guilty; and as to the taking them he justifies, for that before the taking, the other defendant Evan Watts came before him, then sheriff of Com' Radnor, and made his complaint against the plaintiff in a plea of taking and unjustly detaining the cattle, and found pledges to prosecute the said plaint, and to return the cattle, if a return should be adjudged, and prayed a warrant to replevy the same. Whereupon he made his precept to the other defendant S. Price his special bailiff to replevy the same; and the plaintiff should appear at the next county court to answer the said Evan Watts in the said plea; which said precept, before the return and before the taking, he delivered to the said S. Price, who by virtue of it, at the time and place, took the cattle, and the plaintiff not claiming property delivered them to the defendant, and summoned the plaintiff to appear at the next county court, to answer Watts in the said plea, for taking and

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distraining

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distraining his cattle, and then returned his precept executed as aforesaid, he being sheriff at taking and return of precept, which is the same taking, &c.

The defendant *Evan Watts* pleads not guilty generally.

Defendant *Selby Price*, as to all but taking, pleads Not guilty, and as to that justifies by virtue of the precept *supra*.

The plaintiff demurs to both pleas, and shews for cause, that the defendants do not alledge that the cattle were the *proper cattle of the said Evan Watts*, or that he claimed property or title to them, or that they were in his possession, or shewn by him to the sheriff or bailiff, or were distrained by the plaintiff out of his possession.

2dly, That the plea doth not mention what pledges by name were found.

3dly, That it is not alledged plaintiff had notice of the plaint or replevin.

4thly, That the plea amounts to the general issue.

The defendants join in demurrer. *Cur*⁹ held the plea good, and gave judgment for the defendants. *M. 11 Geo. 2. Milles v. Davies, Evan Watts and Selby Price, alias Rees, in Scacc. Comyns's Rep. 590. pl. 258.*

For the learning of avowries, see *D'Anvers's General Abridgment, Tit. Avowry, fol. 644, 645, &c.*

When the defendant in replevin makes confession, and avows, that the property is in himself, it seems to be sufficient without a traverse. *Comyns's Rep. 247. pl. 137.*

By

*By the Stat. 11 Georgii 2. p. 578. reciting,
That*

“ **W**HEREAS great difficulties often
 “ arise in making avowries or consu-
 “ upon distresses for rent, quit-rents, reliefs,
 “ heriots and other services; it is enacted, That
 “ from and after the said twenty-fourth day of
 “ *June* one thousand seven hundred and thirty-
 “ eight, it shall and may be lawful to and for all
 “ defendants in replevin to avow or make con-
 “ sance generally, that the plaintiff in replevin,
 “ or other tenant of the lands and tenements
 “ whereon such distress was made, enjoyed the
 “ same under a grant or demise at such a certain
 “ rent during the time wherein the rent distrain-
 “ ed for incurred, which rent was then, and still
 “ remains due; or that the place where the dis-
 “ tress was taken, was parcel of such certain te-
 “ nements, held of such honour, lordship or ma-
 “ nor, for which tenements the rent, relief, he-
 “ riot, or other service distrained for, was at the
 “ time of such distress, and still remains due,
 “ without further setting forth the grant, tenure,
 “ demise, or title of such landlord or landlords,
 “ lessor or lessors, owner or owners of such ma-
 “ nor; any law or usage to the contrary not-
 “ withstanding: And if the plaintiff or plaintiffs
 “ in such action shall become nonsuit, discontinue
 “ his, her or their action, or have judgment given
 “ against him, her or them, the defendant or de-
 “ fendants in such replevin shall recover double
 “ costs of suit.

“ And

“ And to prevent vexatious replevins of dis-
 “ tresses taken for rent, it is enacted, That from
 “ and after the said twenty-fourth day of *June*
 “ one thousand seven hundred and thirty-eight,
 “ all sheriffs, and other officers having authority
 “ to grant replevins, may and shall, in every re-
 “ plevin of a distress for rent, take, in their
 “ own names, from the plaintiff, and two re-
 “ sponsible persons, as sureties, a bond in double
 “ the value of the goods distrained, (such value
 “ to be ascertained by the oath of one or more
 “ credible witness or witnesses not interested in the
 “ goods or distress; which oath the person grant-
 “ ing such replevin is hereby authorised and re-
 “ quired to administer) and conditioned for pro-
 “ secuting the suit with effect and without delay,
 “ and for duly returning the goods and chattels
 “ distrained, in case a return shall be awarded,
 “ before any deliverance be made of the distress;
 “ and that such sheriff, or other officer as afore-
 “ said, taking any such bond, shall, at the request
 “ and costs of the avowant, or person making
 “ consuance, assign such bond to the avowant or
 “ person aforesaid, by indorsing the same, and at-
 “ testing it under his hand and seal in the presence
 “ of two or more credible witnesses; which may
 “ be done without any stamp, provided the as-
 “ signment so indorsed be duly stamped before
 “ any action brought thereupon; and if the bond
 “ so taken and assigned be forfeited, the avowant
 “ or person making consuance, may bring an ac-
 “ tion, and recover thereupon in his own name;
 “ and the court, where such action shall be
 “ brought, may, by a rule of the same court,
 “ give such relief to the parties upon such bond,

“ as

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“ as may be agreeable to justice and reason ; and
“ such rule shall have the nature and effect of a
“ defeazance to such bond.”

C H A P. VI.

*In what Cases a tenant or other Person shall be
said to commit Waste in Houses, Gardens,
Woods, Pastures, Orchards, &c. and what
Waste shall be punishable, and what not.*

WASTE (*vastum a vastando*, to waste) is a spoil or destruction in houses, gardens or orchards, dove-houses, parks, warrens, fish-ponds, trees, woods, lands, &c. to the prejudice of the heir, or of him in remainder or reversion.

A licence or consent is supposed here to be wanting.

The lessor by law may enter at seasonable times, to see whether any waste is committed: And if the lessee hinders his entering, the lessor may bring his action on the case.

There are two kinds of waste, *voluntary* and *permissive*. *Voluntary*, by *commission* or by pulling down, &c. *Permissive*, by *negligence* or *omission*, as in not repairing. Both are equally injurious to him that hath the inheritance.

It concerns every tenant, of what nature soever his tenure be, to be very careful of committing waste; for he may in committing waste soon become obnoxious to the law, and incur great damage.

I shall

I shall therefore, by way of caution, shew you in what cases a tenant may commit waste, so as to render himself liable to loss and punishment ; and then how far a tenant may act upon his own tenure, and not commit any punishable waste.

If a tenant for life or years, or in dower, do pull down any of the houses or tenements, or suffer them to be uncovered, to the rotting or destroying of the timber or materials of the house, this is waste. *Co. Lit. 53.*

So likewise if glass windows be broken down or carried away, it is waste, though the tenant glazed them himself, for the glass is part of the house. It is also waste to take away wainscot, if it be fixed to the walls or posts of the house.

It is likewise waste to take away doors or windows, or any thing annexed or fixed to the freehold, although the tenant fixed them there himself.

If a tenant build a new house where none was before, it is waste ; and if he suffer it to be wasted, it is a new waste.

The pulling down a stone-wall or mud-wall of an house, is waste. *Co. Lit. 53.*

If a tenant of a park, warren, dove-house, or the like, do not leave such sufficient stores as he found when he entered, it is waste ; and so it is to suffer a park-pale to decay, whereby the deer are lost or dispersed.

Tenants have a special property in trees, as the shade, mast, &c. So that the landlord cannot enter upon the ground and cut down timber, unless he has reserved such a power, or the lease is of the land, excepting the trees ; and for this, *vide 1 Lord Raym. 552. 2 Salk. 638. pl. Cam.*

Rep.

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Rep. 71. *pl.* 44. 11 *Mod.* 18. *pl.* 5. 12 *Mod.* 379. *Fortesc. Rep.* 152. *Asbmead and Ranger.*

If the tenant suffer the houses to be wasted, and then sell timber to repair them, this is a double waste. *Co. Lit.* 53.

Waste is properly in houses, gardens and timber-trees; that is, oak, ash and elm, which are counted timber generally in all places; except in some copyholds elm is not.

Now these timber-trees are said to be wasted, either by cutting them down, lopping or topping them, or any otherwise decaying the timber.

And in some counties where timber is scarce, beech is accounted timber, or other trees used for building houses; and there the cutting of them is waste. *Idem.*

Or if a tenant suffer the young germins of trees to be destroyed, this is destruction and punishable in waste.

To cut down any trees, as willows, birch or the like, which stand and grow in the defence and within view of the dwelling-house, is waste.

It is a waste to cut down hazels which grow not under the great trees, but in a quarter of the wood by themselves.

If a tenant grub up or destroy a quick fence of white thorn, it is waste. *Co. 2 Inst. f.* 53.

Burning of a house by negligence or mischance was waste, but is since made otherwise; yet if it happen through the negligence of a servant, such servant forfeits 100 *l.* or to be sent to the work-house for eighteen months. See at the latter end of this treatise.

Where there is a wood, and nothing growing there but underwood, the tenant cannot cut all:

But

But if it be a wood where great trees grow amongst the underwood, there he may cut all the underwood.

It is waste to cut apple-trees, if they bear fruit, though they lie along the ground.

It is also waste to cut damfin-trees, or any fruit-trees growing in a garden or orchard.

To dig for gravel, chalk, clay, brick, earth or stones, or the like, is waste; and so it is if a tenant dig for any mines which were not open at the time of the lease made.

To suffer a bank or wall of the sea to be in decay, so that by the flux and reflux of the sea the marsh is overflowed, so that it becomes unprofitable, is waste.

But if the sea break in suddenly by a violent tempest, it is no waste.

It is waste also if a tenant suffer the banks of any river or water to decay, whereby the ground is surrounded, or becomes unprofitable; so it is to suffer pasture-ground to be surrounded so as it becomes rushy, or arable land, so that it becomes tough clay.

It is waste for any tenant to convert arable land into wood, or meadow into arable.

The punishment in waste is treble damages, and forfeiture of the place wasted. *Stat de Gloc.* 6 E. 1. c. 5.

There is voluntary or actual waste, and permissive waste. See p. 207.

An action of waste lieth against a tenant by the curtesy, tenant for life or years, half a year, or tenant in dower, by him that hath the estate of inheritance, in any of all these cases before-mentioned.

But

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But waste doth not lie against a guardian in so-
eage, but an action of account or trespass.

Neither doth waste lie against a tenant by
elegit, statute-merchant or the staple; but an
action of account after the debt and damages
levied.

Waste doth not lie against a tenant at will;
but if such tenant voluntarily pull down houses,
or cut down timber-trees, or the like, in this case
the lord may have an action of trespass against him.
Co. Lit. 54.

But against a tenant in mortgage, either an ac-
tion of waste or an account will lie against him,
because his estate is conditional. *Noy's Max.*
p. 33.

If two or more joint-tenants or tenants in com-
mon be in a house, and one will repair the house,
and the other will not; in that case, he that will
repair it, may have a writ *de reparatione facienda*.

If a landlord covenant to repair the house, and
doth it not, in this case the lessee may cut timber
growing upon the ground, and repair it, though he
be not compellable thereunto, and shall not be
punishable in waste for so doing.

No man can have an action of waste, unless he
hath the immediate estate of inheritance; but
sometimes another shall join with him. *Co.*
Lit. 53.

As if a reversion be granted to two, and the
heirs of the one, they two shall join in an action
of waste.

In like manner the surviving *copartners*, and
the tenant by the curtesy shall join in an action of
waste.

If

If a tenant for years commit waste and die, an action of waste lieth against his executors or administrators for waste done before their time.

If there be two *copartners* of a reversion, and one of them dies, the aunt and niece shall join in an action of waste. *Kitch. f. 244.*

If a tenant for life commit waste, and after surrender his estate, and the lessor accepts it, the lessee is discharged of the waste.

If a stranger commits waste upon the lands which one holdeth for life or years, the tenant shall suffer for it, and is left to take his remedy over, against him that did it.

If a landlord covenant to deliver timber out of the same land to repair the house let, and will not deliver it, and for defect thereof the tenant will not repair it, but suffers the house to fall down, this is waste in the tenant, and he is punishable for it, for he might have justified cutting the timber himself.

But if the timber be to be taken out of the lands, and be not delivered, then the tenant is excusable if he suffers the house to fall, and no action of waste lies against him.

If a single woman rents lands and marries, and her husband commits waste and dies, she shall be punished for this waste done by her husband. *Idem.*

But if a lease be made to a man and his wife, and her husband commits waste and dies; in this case the wife shall not be punished for such waste, unless she agrees to the estate, for she shall not be prejudiced by her husband's act during coverture.

If

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If a woman be tenant for her life, and marries, and her husband commits waste, and the wife dieth, the man is not punishable for this waste: But if a woman be possessed of a term of years, and takes a husband, who commits waste, and the wife dies; here the man is liable to an action of waste, for the waste by him committed, because he enjoyeth the term of the lease. *Co. Lit. 54.*

If a man makes a lease for life or years, and after grants the reversion for years, the lessor shall have no action of waste during the years; for he himself hath granted away the reversion, in respect whereof he is to maintain his action.

If an action of waste be brought, and the term end while it is depending, yet the writ shall not abate; for although the plaintiff cannot recover the place wasted, yet he shall recover the treble damages.

Likewise if one be tenant for term of another's life, and makes waste, and afterwards the *cestui qui vie* dies, here the lessor shall recover treble damages, but cannot recover the place wasted, for that falls to him by the death of the *cestui qui vie*. *Co. 1 Par. Inst. f. 285.*

If waste be done in one corner of a wood, that place only which is wasted shall be recovered: But if it be done here and there about the wood, then the whole wood shall be recovered, or as much wherein the waste *sparsim* is done. *Co. Lit. 54.*

And so in houses, so many rooms shall be recovered wherein there is waste done.

If a man make waste in cutting trees which grow in hedge-rows which inclose pastures, nothing shall be recovered but the place wasted;
that

that is, the circuit of the roots, and not the whole pasture; but if trees grow scatteringly about the pasture, then the whole pasture is forfeited if they be cut. *Pract. Reg.* 654. *B. R.*

It is a good plea in bar to a writ of waste, to say that the house fell by a sudden tempest, altho' the tenant did covenant to repair it; but it is no plea in an action of covenant.

It is also a good plea in a writ of waste, to say that the house was ruinous at the time of the lease making, and the timber so putrified and rotten that it fell.

It is also a good plea, to say that the plaintiff had entered upon the land, before which entry no waste was made; or that he surrendered, and the plaintiff did accept, before which time no waste was made.

If a tenant doth waste, and afterwards surrender, and the lessor agrees, yet the lessor may have an action of waste, and recover treble damages. *Co. 1 Par. Inst. f.* 285.

If an action of waste be brought by husband and wife in remainder in special tail, and the wife dieth (the suit depending) without issue; in this case the writ of waste shall abate.

If a lease be made to hold to one without any impeachment of waste, the lessee may cut down trees, and convert them to his own use: But if the words be, to hold without impeachment of any action of waste; in this case, if the lessee cut down trees, the lessor may have them. *Co. Lit.* 220. and *vide Lewis Bowles's and Herlakenden's* cases.

If a tenant for life grant a rent-charge, and after doth waste, and the lessor recover in an action

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tion of waste, he shall hold the land charged during the life of the tenant for life; but if the rent were granted after the waste done, the lessor shall then avoid the grant made by the lessee for life. *Co. Lit.* 223, 224.

If a tenant in fee release to his tenant for life all his right, yet he shall have an action of waste. *Idem* 345.

And if a tenant in tail make a lease for his own life, yet he shall have an action of waste.

But if there be a tenant for life, the remainder to another in tail, and he in the remainder release to the tenant for life all his right and estate in the land, he cannot afterwards have an action of waste.

If the grantee of a reversion bring an action of waste, the lessee may plead generally, that he hath nothing in the reversion.

If a lessee before his term begin, enters into the land let to him, and do an act which amounteth unto waste, the lessor shall not have an action of waste for the same.

None shall have judgment to recover in an action of waste, where the waste comes but to 12 *d.* or such a small sum.

If waste be done upon lands let for a term of years or life, by one against whom the lessee can have no remedy in law for committing the same waste, the lessee in such case is not punishable for the same by the lessor, except there be a special covenant in the lease, that he shall not permit nor suffer waste to be done. *Co. Lit.* 303.

If the house be uncovered when the tenant cometh in, it is no waste in the tenant if he suffer it to fall down.

The

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The rising of a new frame of a house which was never covered, is no waste. If a house fall by a sudden tempest, or be burnt by lightning, or destroyed by enemies, or the like, without any default of the tenant, or was ruinous at his coming in, and fall down; this is no waste.

And the tenant may build the same again with such materials as remain, and with other timber growing upon the ground; but he must not make the house any larger than it was, for if he do, it is waste.

If a tenant fix a furnace, and not to the walls nor posts of the house, if he take it away within his term, it is no waste.

If a tenant in fee fix a furnace in the middle of the house, the heir shall have it, and not the executors.

If a house fall by a great wind or tempest, the lessor shall have the timber, for it is no waste, and the lessee is not bound to build it up again.

Relief in chancery for waste, *vide antea*.

Digging of land by a particular tenant is waste. *Dyer* 361. *Lit. Rep.* 295.

But not if it be for bettering the ground; Yet if a copyholder build a new house upon part of the land, it has been adjudged a forfeiture; for though the land is bettered, yet it is in another kind. *Id.* & 22 *H.* 6.

A lessee of land made it a hop-ground, and it was adjudged waste. *Lit. Rep. Ibid.* Although one acre now was better than three before; but it was in another kind.

To pull down an house is waste; but if the tenant build it up again before an action brought, he may plead that specially. *1 Mod. Rep.* 94.

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To pull down a malt-mill, and build a corn-mill, it is waste. *Idem. Co. Lit. 53. 1 Rol. 507. 2 Rol. 815.*

If a house could not be repaired without pulling it down, it must be pleaded specially. *1 Mod. Rep. 94.*

Waste in the house is waste in the curtilage, and waste in the hall is waste in the whole house. *Idem.*

To convert a brewhouse into tenements is waste also, although they be of greater value. *1 Lev. 309.*

As is observed before, if a tenant make waste in cutting of wood or timber contrary to the provisions, exceptions or covenants in his lease; for such a breach the landlord may bring his action or covenant before the end of the term.

Now waste is a forfeiture, but if a copyholder by custom hath been fined, or removed it, that proves that it is no forfeiture; for where the law gives the lord another Recompence, it will not make a forfeiture: And the lord may pursue a copyholder with amerciaments till he pluck up a hedge. *Lit. Rep. 267.*

Concerning the Destruction of Corn, Wood, &c.

By Stat. 43 Eliz. c. 7. sect. 1. "All lewd persons,
" which shall cut or unlawfully take away any
" corn growing, or rob any orchards or gardens,
" or break or cut any hedge, pales, rails or fence,
" or dig, pull up or take up, any fruit trees, to
L " the

“ the intent to take the same away, or shall cut
 “ or spoil any woods or underwoods, poles or
 “ trees standing, not being felony, and their pro-
 “ curers or receivers knowing the same, being
 “ convicted by confession, or one witness, before
 “ some justice of peace, mayor or other head of-
 “ ficer, where the offence shall be committed, or
 “ the party apprehended, shall give such recom-
 “ pence for the damages as by such head officer
 “ or justice of peace shall be appointed, for the
 “ first fault ; and if such offenders shall be thought
 “ in the discretion of the justice, &c. not able,
 “ or do not make satisfaction for the damages,
 “ the justice, &c. shall commit the offenders to
 “ some constable or other inferior officers of the
 “ city, &c. or hamlet where the offence shall be
 “ committed, or the party apprehended, to be
 “ whipped ; and for every such offence for which
 “ the offenders shall be eisloons committed, and
 “ to receive the said punishment of whipping.”

By *Sect. 2.* “ If any constable or inferior of-
 “ ficer do not, at the command of any justice of
 “ peace or other head officer, execute by himself
 “ or some other the punishment limited by this sta-
 “ tute, it shall be lawful for the justice to com-
 “ mit the constable, &c. to the common gaol,
 “ until the offenders be by the said constable, or
 “ by his procurement whipped.”

By *Sect. 3.* “ Provided that no justice of peace,
 “ or other head officer, do execute this statute for
 “ any the offences aforesaid done unto himself,
 “ unless he be assisted with one or more other
 “ justices of the peace whom the offence doth not
 “ concern.”

By

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By *Stat. 15 Car. 2. c. 2. §. 2.* " Every constable or other person shall have power to apprehend all persons they shall suspect, having or carrying away any burden of wood, bark or bast of any trees, or any gates, stiles, posts, pales, rails or hedge-wood, broom or furze; and by warrant of one justice of peace any officer shall have power to search the houses or other places of all persons they shall suspect to have any wood, poles, young trees or bark or bast of trees, or any gates, &c. and where they shall find any such, to apprehend all persons suspected for taking the same, and them to carry before a justice of peace: and if they do not give a good account, how they came by such wood, &c. or shall not within some convenient time, to be set by the justice, produce the party of whom they bought the same, or some witness to depose such sale of the wood, &c. they shall be convicted of the offence of cutting and spoiling of the same woods, &c. within the statute, 43 *Eliz. c. 7.*"

By *Stat. 3.* " Every person convicted shall for the first offence give the owner such damages as the justice shall appoint, and pay down to the overseers of the poor such sum, not exceeding 10*s.* as the justices shall think meet: And if such offender do not make satisfaction to the owner, and pay to the poor, in manner aforesaid, the justice shall commit him to the house of correction, not exceeding one month, or to be whipped by the constable. And if such person shall again commit the said offence, and be convicted, he shall be sent to the house of correction for one month, and kept to hard la-

“bour. And if such person shall again commit
 “the said offence, and be convicted the third time,
 “he shall be deemed an incorrigible rogue.”

By *Sect. 4.* “Whosoever shall buy any burdens of wood, poles or sticks, which may be
 “justly suspected to have been unlawfully come
 “by, it shall be lawful, for one justice, upon
 “complaint, to examine the matter upon oath;
 “and if they shall find that the same was bought
 “of a person who might justly be suspected to
 “have unlawfully come by the same, and that
 “the same was unlawfully come by, the justice
 “shall award the party to pay treble the value to
 “the party from whom the same was unlawfully
 “taken, and in default of present payment, to issue
 “warrants to levy the same by distress and sale of
 “goods, and in default of distress, to commit the
 “party to gaol, there to remain one month.”

By *Sect. 5.* “No person shall be questioned
 “for any thing upon this law, that hath been punished for the same by any former law; nor
 “unless he be questioned within six weeks after
 “the offence.”

By *Stat. 22 & 23 Car. 2. c. 7. s. 5.* “If any
 “person shall in the night-time maliciously and
 “unlawfully maim, wound or hurt, any horses,
 “sheep or other cattle, whereby the same shall
 “not be killed, or shall destroy any plantations
 “of trees, or throw down any inclosures, such
 “offenders shall forfeit unto the party grieved
 “treble the damage, to be recovered by action
 “of trespass, or upon the case, at common law.”

By *Sect. 6.* “Upon request of the party injured, any three justices of peace (whereof one
 “of the *quorum*) may inquire, as well by the
 “oaths

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“ oaths of twelve men as by examination of witnesses, and issue out warrants, as well for the
“ summoning of jurors, as for the apprehending
“ of persons suspected, and to take their examination, as also to cause other persons to appear
“ and give information upon oath concerning the
“ premises ; so as no person be proceeded against
“ for any offence concerning which he shall be
“ examined as a witness, and shall make a true
“ discovery thereof ; and in case any person shall
“ refuse to be examined, being duly summoned ;
“ it shall be lawful for the justices to commit the
“ party so refusing to the common gaol, until he
“ shall submit to be examined upon oath.”

By *Stat. 7.* “ Provided that no person, who
“ shall be punished for any offence by this act,
“ shall be punished for the same by any other
“ law ; nor shall be questioned for the same, unless
“ he be proceeded against within six months
“ after the offence.”

By *1 Geo. c. 48. s. 1.* “ If any person shall maliciously break down, cut up, bark, destroy or
“ spoil, any timber-tree, fruit-tree, or other tree,
“ the person damaged shall receive such satisfaction
“ from the inhabitants of the parish, town, hamlet,
“ vill, or place, to be viewed, and costs to be recovered,
“ in the same manner as hedges overthrown in the night,
“ by *13 Edw. 1. c. 46.* and where such offence shall be committed in
“ *Scotland*, to be recovered by way of summary action,
“ as damages in other cases of riot ; unless the party
“ offending shall by such parish, &c. be convicted of such offence within six months.”

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By *Sect. 2.* “ Any two justices of the county,
 “ &c. or the justices in sessions, on complaint by
 “ any inhabitant of such parish, &c. or of the
 “ owner of the trees, or of any other, may cause
 “ such offender to be apprehended, and hear and
 “ determine the offences aforesaid; and on con-
 “ viction of such offender shall commit him to the
 “ house of correction, to be kept to hard labour
 “ for three months; and where there are no
 “ houses of correction, the justices shall commit
 “ him to prison for four months; and shall also
 “ order that such offender be publicly whipped
 “ by the master of such house of correction once
 “ every month during such three months, in
 “ such borough or corporation, if the offence be
 “ committed therein; or in the market-town
 “ where such house of correction stands, or in the
 “ next market-town in the county, on the mar-
 “ ket day, between the hours of eleven and two;
 “ and where there is no house of correction, the
 “ justices shall order such offender to be whipped
 “ by the hangman once every month, during such
 “ four months, on the market day where such of-
 “ fenders shall be committed, or on the market day
 “ of some town, between the hours aforesaid.”

By *Sect. 3.* “ Before such offender be discharg-
 “ ed, he shall find sureties for his good behaviour
 “ for two years.”

By *Sect. 4.* “ If any person shall maliciously
 “ set on fire, burn, or cause to be burnt, any wood,
 “ underwood or coppice; such malicious setting
 “ on fire is made felony: And where such of-
 “ fences are committed in *Scotland*, the offenders
 “ shall suffer as wilful fire-raisers, according to
 “ 7 *Ann. c. 21.*”

By

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By *Stat. 6 Geo. c. 16. s. 1.* “ If any person
“ shall either by day or by night cut, destroy,
“ bark, deface, spoil or carry away, any wood
“ springs, trees, poles, woods, tops of trees, un-
“ der-woods or coppice-woods, thorns or quick-
“ sets, without consent of the owner; or shall
“ break open, throw down or destroy, any hedges,
“ gates, posts, stiles, fences, ditches, or other in-
“ closures of such woods, wood-grounds, parks,
“ chases or coppices, plantation or trees, thorns
“ or quicksets; the lords of manors or owners
“ who shall be damaged thereby, shall have such
“ remedy from the inhabitants of the parishes,
“ towns, hamlets, villages or places, joining to
“ such wood springs, &c. as for hedges over-
“ thrown in the night, by 13 *Edw. 1. c. 46.* un-
“ less the offender shall by such parish, &c. be
“ convicted of such offence within six months.”

By *Stat. 2.* “ If any person in a riotous, open,
“ tumultuous, or in a secret and clandestine man-
“ ner, wrongfully and maliciously shall cut down,
“ destroy, burn, carry away, &c. any wood, or
“ springs of woods, &c. or shall in such riotous,
“ &c. manner, maliciously break open, throw
“ down or destroy, any hedges, gates, posts or
“ other inclosures of such woods, &c. any two
“ justices of peace, or the justices in sessions,
“ upon complaint made by any inhabitant or
“ other, may cause the offender to be apprehend-
“ ed, and hear and determine such offences; and
“ if such justices shall convict any person of
“ the trespasses aforesaid, they shal inflict the
“ penalties in 13 *Ed. 1. c. 46.*”

By *Stat. 3.* “ If any person be prosecuted for
“ any thing done in pursuance of this act, or

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“ *Geo. c. 48.* the defendant may plead the general issue, &c. and recover treble costs.”

By 6 *Geo. 3. c. 36.* “ All persons who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil, destroy, or carry away, any oak, beech, ash, elm, fir, chesnut, or asp, timber-tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner first had ; or shall, in the night-time, pluck up, dig up, break, spoil, destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants of the value of 5*s.* growing or being in the garden ground, nursery ground, or other inclosed ground, of any person or persons whomsoever ; shall be deemed guilty of felony, and be subject to the like pains and penalties as in cases of felony ; and the court, before whom they shall be tried, are authorized to transport such persons, for seven years, to any of his majesty’s plantations in *America*, in like manner as other felons: And all persons who shall be wilfully aiding, abetting, or assisting, in any the offences aforesaid, or who shall buy or receive such roots, shrubs, or plants, of the value aforesaid, knowing the same to be stolen ; shall be subject to the same punishment as if they had stolen the same.”

By *Stat. 6 Geo. 3. c. 48. f. 1.* “ Every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, or destroy, or carry away, any timber-tree or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner first had ; or,

“ in

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“ in any of his majesty’s forests or chases, with-
“ out the consent of the surveyor, or his deputy,
“ or person intrusted with the care of the same ;
“ and shall be convicted upon the oath of one
“ credible witness before any justice or justices
“ for the county or place wherein such offence
“ shall be committed, shall, for the first offence,
“ forfeit such sum, not exceeding 20*l.* as to such
“ justice or justices shall seem meet, together
“ with the charges previous to and attending such
“ conviction, to be ascertained by such justice,
“ &c. and upon non-payment, such justice &c.
“ shall commit him to the common gaol of the
“ county or place where the offence shall be com-
“ mitted, without bail or mainprize, for any time
“ not exceeding twelve months, nor less than
“ six months, or until the penalty and charges
“ shall be paid ; and being guilty of the like of-
“ fence a second time, and convicted in like
“ manner, he shall forfeit such sum, not exceed-
“ ing 30*l.* as to such justice or justices shall seem
“ meet, together with the charges previous to
“ and attending such conviction, to be ascertained
“ by such justices, &c. and upon non-payment,
“ shall be committed, without bail or mainprize,
“ for any time not exceeding eighteen months,
“ nor less than twelve months, or until the pe-
“ nalty and charges shall be paid ; and being
“ guilty of the like offence a third time, and con-
“ victed in like manner, he shall be deemed guilty
“ of felony ; and the court before whom he shall
“ be tried, shall transport such person for the
“ space of seven years, to any of his majesty’s
“ plantations in *America*, in like manner as other
“ felons.”

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“ By *Sect.* 2. “ All oak, beech, chesnut,
 “ walnut, ash, elm, cedar, fir, asp, lime, sycamore,
 “ and birch trees shall be deemed timber-trees within the meaning and provision of this act.”

By *Sect.* 3. “ Every person who shall pluck
 “ up, or cut, spoil, or destroy, or carry away any
 “ root, shrub, or plant, roots, shrubs or plants,
 “ out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person, without the consent of the owner first had,
 “ and shall be convicted upon the oath of any
 “ one or more credible witness or witnesses, before
 “ any justice or justices for the county or place
 “ wherein such offence shall be committed, shall,
 “ for the first offence, forfeit such sum as to such
 “ justice, &c. shall seem meet, not exceeding 40s.
 “ together with the charge previous to and attending such conviction, to be ascertained by such
 “ justice, &c. and committing again the like offence,
 “ and convicted in manner aforesaid, shall forfeit
 “ such sum as to the said justice, &c. shall seem
 “ meet, not exceeding 5*l.* together with the
 “ charges previous to and attending the conviction; and committing again the like offence,
 “ and being convicted the third time, he shall be
 “ deemed guilty of felony; and the court, before
 “ whom he shall be tried, shall transport such
 “ person, for the space of seven years, to any of
 “ his majesty’s plantations in *America*, in like
 “ manner as other felons.”

By *Sect.* 4. “ All persons who shall go into
 “ the woods, underwoods, or wood-grounds, of
 “ any of his majesty’s subjects, not being the law-
 “ ful

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“ ful owners thereof, and shall there cut, lop,
“ top, or spoil, split down, or damage, or other-
“ wise destroy, any kind of wood or underwood,
“ poles, sticks of wood, green stubs, or young
“ trees, or carry away the same; or shall have in
“ his, her, or their custody, any kind of wood,
“ underwood, poles, sticks of wood, green stubs,
“ or young trees, and shall not give a satisfac-
“ tory account how he, she, or they, came by
“ the same; and shall be convicted before any
“ one or more justices of the peace, on the
“ oath of one or more credible witness or wit-
“ nesses; shall, for the first offence, forfeit and
“ pay immediately, on conviction, any sum not
“ exceeding 40s. together with the charges pre-
“ vious to and attending such conviction, to be
“ ascertained by the said justice or justices; and
“ committing any of the said offences a second
“ time, and being again convicted, shall forfeit
“ and pay any sum not exceeding 5*l.* together
“ with the charges previous to and attending
“ such conviction, to be ascertained as aforesaid;
“ and committing any of the offences aforesaid a
“ third time, and being duly convicted according
“ to law, shall be deemed incorrigible rogue or
“ rogues, and be punished as such.”

By *Sec. 5.* “ The justices of the peace for the
“ respective counties or places wherein any of
“ the offences against this act shall be done, are
“ authorized to put this act in execution, and to
“ administer an oath to any such credible witness
“ or witnesses.”

By *Sec. 6.* “ Such justice or justices, unless
“ the respective forfeitures shall be paid down
“ upon conviction forthwith (where not other-

“wise directed by this act) may commit such
 “offenders, for the first offence, to the house of
 “correction for one month, to hard labour, and
 “to be once whipped there; and for the second
 “offence (where not otherwise directed by this
 “act) to the house of correction for three months,
 “to hard labour, and to be whipped there once
 “in every one of the said three months.”

By *Seet. 7.* “If any person shall, at any time,
 “hinder, or attempt to prevent, the seizing or
 “securing any person employed in carrying away
 “any such timber, or other trees; he shall, for
 “every such offence, forfeit 10*l.* to the person or
 “persons who shall convict such offender; and
 “if not immediately paid on conviction, he shall
 “be committed to the house of correction, to
 “hard labour, for any time not exceeding six
 “calendar months.”

By *Seet. 8.* “One moiety of all the before-
 “mentioned forfeitures (not otherwise directed)
 “shall go to the informer, and the other moiety
 “to the person aggrieved”

By *Seet. 9.* “The conviction of offenders
 “against this act shall be certified, by the justices
 “before whom the same shall be made, to the
 “next general or quarter-sessions of the peace, to
 “to be filed amongst the records of the said ses-
 “sions; and shall not be quashed, or adjudged
 “void or insufficient, for want of form; nor
 “be liable to be removed by *Certiorari* into
 “the court of *King's Bench*, but shall be deemed
 “to be final to all intents and purposes.”

C H A P. VII.

*The Doctrine concerning Common of cattle, &c.
between Landlord and Tenant.*

Common signifieth, in our common law, that soil or water, whereof the use is common to this or that town or lordship; as common of pasture, (termed *communio pasturæ*). *Brañ. l. 4. c. 19 & 40.* or a common (because it is common to many) is a profit that a man hath in the land of another.

Common of pasture is a right of putting beasts to pasture in another man's soil.

Common of fishing, *communio piscariæ*, is a liberty of fishing in another man's ground.

Common of turbary, *communio turbariæ*, is a licence for digging of turf upon another's ground, or in the lord's waste.

Common of estovers, *communio estoveriorum*. *Kitch. f. 94.* See *Estovers in tabula*.

Again; Common (*i. e.* common of pasture) is divided into, 1. common in gross; 2. common appendant; 3. common appurtenant; 4. common by reason of vicinage (neighbourhood.) *Vide Co. Lit. 121. a.*

Common in *gross* is a liberty of commoning conveyed alone without land by *deed*, or gained by *usage* time out of mind. So that common *appendant* cannot be common in *gross*. *1 Inst. 30. b. 32. a. 122. a. 164. b. 4 Rep. 30.*

Mr.

Mr. Cowel says, That common appendant and common appurtenant are in a manner confounded, as appears by *Fitz. Nat. Brev. f. 180.* and are defined to be a liberty of common appertaining to, or depending of such and such a freehold; yet *Kitch. f. 94.* seems to make this difference, That he which hath common appurtenant, hath it without limitation of this or that kind of beasts; but that this again is controlled by *Dyer, f. 70. b. Numb. 19.* And that he who hath common appendant, hath it but for beasts commonable, as horses, oxen, kine and sheep, being accounted fittest for the ploughman, and not of goats, geese and hogs. Whereupon the author of the *New Terms of the Law* addeth another difference, which is, That common appurtenant may be severed from the land whereunto it is appurtenant, but not common appendant.

The original of common appendant is expressed in *4 Lib. Co. Rep. f. 34.* to this purpose, viz. That when a lord enfeoffed another in arable lands to hold of him in socage, as all tenure in the beginning (according to *Littleton*) was; the feoffee, to maintain the service of his plough, had common in the waste of the lord for his necessary beasts to gain and compost his land, and that for two causes: One that for that (as then it was taken) it was tacitly implied in the feoffment, by reason the feoffee could not gain or compost his land without cattle, and cattle could not be sustained without pasture; and so by consequence the feoffee had, as a thing necessary and incident, common in the wastes and land of the lord. The second reason was, for maintenance and advancement of tillage, which is much regarded and favoured in the law.

Common

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Common for cause of vicinage, or because of neighbourhood, is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town: Which kind of common they that challenge may not put their cattle into the common of the other town, for then they are distrainable; but turning them into their own fields, if they stray into their neighbour's common, they must be suffered. See the *Terms of the Law*, and *Cowel's Interp. verb. Common*

That if there be common by reason of vicinage between two manors time out of mind, &c. yet one may inclose against the other. *Co. Lit. 122. 4 Co. 38. b.* So it is said, if he incloses any part of his common, the common *pur cause de vicinage* is gone. But in such a case, if the lord of one manor incloses, he shall not bind a copyholder of the same manor, but that he may have common for cause of vicinage as he had before. *Mich. 3 Jac. per Hobart.*

Where there is common for cause of vicinage between two, yet one cannot put his cattle into the land of the other, but they ought to escape there of themselves by reason of the vicinity, for this is but an excuse of the trespass. *Co. Lit. 122.*

It was said, That every common for cause of vicinage, is a common appendant, and that a man for such reason need not prescribe; but that it is sufficient to say, That he and all those whose estate, &c. have used to intercommon *causa vicinagii*; but yet it is doubtful, and 13 *H. 7. 13 b.* there is a prescription for common *causa vicinagii*. And in *Poph. 201. dubitatur*, whether it was sufficient that
he

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he and all the occupiers of, &c. have had, &c.

Resolved *per cur'.*

That if there be common for cause of vicinage between the towns of *A.* and *B.* and *A.* hath fifty acres of common, and *B.* hath an hundred acres of common, the inhabitants of *A.* cannot put more cattle into their common than the fifty acres will depasture, without any regard to the common of *B.* for the original cause of this common was not the profit of their town, but to prevent suits in open countries for reciprocal escapes from one field into the other. 7 *Co.* 5. *b.*

As for *shack* in the county of *Norfolk*, (which is a sort of common for the cause of vicinage) and the commencement thereof, *vide* 7 *Co.* 5.

Before we see farther into common appendant, &c. it will be convenient to inquire after the common of the lord.

For Common as Lord.

The lord of the manor, seised of the wastes in which the tenants have common, may, it is said, feed the common by part or all, of common right, without disturbance, 18 *E.* 3. 43. 18 *Aff.* 4. But whether the lord by prescription may be restrained to a certain number, *vide* 2 *Roll. Abr.* 267. *Pla.* 2.

If the owner of the soil grants to another common without number there, yet the grantee cannot use the common with so many cattle, that the grantor shall not have sufficient common for his cattle. 12 *H.* 8. 2. *Bridgm.* 5. 1 *Roll. Rep.* 365.
1 *Saund.*

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1 *Saund.* 345. *Co. Lit.* 122. a. 1 *Roll. Abr.* 339. Pl. 5.

So where a man claims common without number by prescription or custom, for it is against the nature of the word *common* to exclude the owner of the soil, and it was implied in the first grant, That the owner of the soil should take his reasonable *profit* there. *Co. Lit.* 122. 2 *Roll. Abr.* 265. Letter *E*.

It is clear that occupiers or inhabitants cannot claim this common by prescription. *Quære*, Whether they may lay a custom for them to have it. *Lord Raym.* 406, 407.

And though *per F. N. B.* 125. D. Common without number is not admeasurable; yet if the commoner surcharges it, the lord may distrain. *Vide* 1 *Saund.* 345.

The lord by prescription may agist the cattle of a stranger in the common, but without prescription he cannot. 30 *E.* 3. 27.

He may license a stranger to put in his cattle, if he leaves sufficient common for the commoners. 2 *Mod.* 6, 7, 275.

And if *A.* grants common to *B.* in a certain place, *A.* cannot afterwards erect a rick there; for by the grant the cattle of *B.* are to range over the whole place without restraint, and it shall not be in the power of *A.* to defeat his own grant. *Cro. Jac.* 271, 272. int' *Farmer & Hunt.* *Vide Yelv.* 201, 202.

If the lord alien in fee the soil where the common is to be taken, saving his power of feeding as lord, he shall have common there as lord. 18 *E.* 3. 34.

And

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And if the lord, without any saving, aliens the soil where the common is to be taken, his common as lord is gone by the feoffment; but the alienee of the soil may feed it as the lord might have done before: For that this common is given, because it is in his soil where the lord has it, and not because he is lord. *Ibid.*

Of Common Appendant.

That common appendant is of common right.
26 H. 4.

Common appendant is a right belonging to one's *arable* land, of putting beasts commonable into another's ground to feed there.

That it is not common appendant, unless it has been appendant time out of mind. 40 Ed. 3. 10. b. Keilw. 129. b. Bro. Com. 16. 5 Aff. 2. For such common cannot be created at this day. 5 Aff. 9. Fitz. Affize 134. 26 H. 8. 4.

That common appendant may be through all the year, saving a certain time, at what time the lord feeds it. 27 E. 3. 86. b.

Whether claiming common *a tempore fractionis campi* is good or not. Lord Raym. 645.

Also it seems, that common appendant may be limited upon condition. 37 H. 6. 34. Fitz. Tresp. 85. Br. Common 13.

That common appendant may be unlimited; so *quamdiu* he pays so much; so *tamdiu* as he shall be living upon such a house to which the common is appendant. *Ibid. ut supra.*

So common appendant may be to common after the corn is severed till it is re-sowed. 37 H. 6. 34. And if part only is re-sowed, he may
common

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common in the residue. *Yelv.* 185. 2 *Brownl.* 189. *Br. Common* 13.

So it may be to common in the meadow after the hay carried, till *Candlemas*. 17 *Eliz.* 3. 26. b. 34.

So it may be to common in the pasture from the feast of St. *Augustine* to *All-Saints*, &c. *Ibid.*

So it may be to common two years after the corn cut and carried away, till it is re-sowed, and every third year *per totum Annum*. 22 *Aff.* 42. *Vide* 2 *Saund.* 343, 344.

That a man may have a common appendant for thirty cattle in one place, and to the same land, common appendant also in another place for part of the said cattle, and so may take it where he pleases. 17 *Ed.* 3. 34. b.

That a man may prescribe for common in certain lands from the time the corn is severed, until the land shall be sowed again by the assent of the commoners; for by the law the owner cannot plough where another hath common. 1 *Leon.* 73. *int'* *Hawks* and *Molineux*.

So a man may prescribe for pasturage for two geldings in a thousand acres of meadow, from the first day of *May* till the grass be there cut and made into hay; for being in so great a quantity of land, the going of two geldings there cannot so defoul or debruisse it, but that hay may well be made thereof. *Gro. Jac.* 37. *int'* *Sir John Thomas* and *Laffels*.

It ought to be appendant to arable land, but not to other land which is not arable, nor to a house: Neither can it be appendant to land which is approved within time of memory out of the waste of the lord: Neither can common of turbary
be

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be appendant to land. 26 H. 8. 44. 5 Aff. 2. 9. *Br. Com.* 13, 16. *Fitz. Affize* 134.

Also it ought to be for such cattle as plough his land (to which it is appendant, as it seems) and compester it, viz. horses and oxen to plough the land, and cows and sheep to compester it. 37 H. 6. 34. *Br. Com.* 13. *Com. Lit.* 122.

But he may not use it with goats, geese, or such like, for these are not necessary to do, *ut supra*. 37 H. 6. 34. *Br. Com.* 13.

And therefore a prescription to have common appendant for all manner of cattle is not good, because it comprehends goats, geese, and such like; but this is common appurtenant. 37 H. 6. 34. *Br. Com.* 13, 14. 1 *Roll. Abr.* 401. pl. 2.

Again, the common is admeasurable according to the quality and quantity of the freehold, to which he claims to have this common appurtenant. 37 H. 6. 34. *Br. Com.* 13. *Vide postea* concerning admeasurement.

Viz. For all those which are levant and couchant upon the land. 15 *Ed.* 4. 32. b. 11 H. 8. 12. *Br. Com.* 8. And *per Noy* 30. *dubitatur*, what cattle shall be levant and couchant; but there said, That the chief justice in the circuit held, for so many cattle as the land to which, &c. may maintain in the winter, shall be said levant and couchant. *Vide* 1 *Vent.* 54. And that so many beasts may be said levant and couchant upon a house as may be tied there, and are usually to be maintained in the house. 1 *Brownl.* 101. But *per Vaugh.* 253. in a common intent, cattle cannot be levant upon a messuage only.

That

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That he who claims common by force of a prescription, as an inhabitant of a town, shall have no other cattle to common there but what are levant and couchant within the same town. 15 *Ed.* 4. 32. *b.* *Br. Com.* 8. For there is no diversity between this and common appendant. *See after.*

That common appendant may by usage be limited to any certain number of cattle. 17 *E.* 3. 27. 34. *b.*

Generally the commoner cannot use the common but with his own proper cattle. 11 *H.* 6. 22. *b.* *Fitz. Com.* 3. *Br.* 47. 22 *Aff.* 84. *Br. Com.* 40. *Fitz. Affize* 228.

If a commoner hath not any cattle to manure the land, he may borrow other cattle to manure it, and may use the common with them, for by the loan they are in a manner made his own cattle. 45 *E.* 3. 26. 11 *H.* 6. 22. *b.* 14 *H.* 6. 6. *b.* 22 *Aff.* 84. *Br. Com.* 5, 14, 406. *Br. Seisin* 5. *Fitz. Com.* 3, 57. *Fitz. Tres.* 33. *Fitz. Affize* 228.

He cannot agist the cattle of a stranger. 11 *H.* 6. 22. *a.* 11 *b.* 22 *Aff.* 84. *Fitz. Com.* 3. *Br.* 40, 47. *Fitz. Aff.* 228.

If he takes the cattle of a stranger to fold, and folds them accordingly, being levant and couchant upon the land, he may use the common with these cattle, for he has a special property in them for the time. *Mich.* 10 *Car. B. R. int' Jason and Hellyard, per cur'.*

Where common is grantable over or not, *vide Roll. Abr.* 46. *pl.* 15, 16.

If a man as inhabitant of a town claims common for all manner of cattle in a place, and

claims the common by reason he is an inhabitant there, he shall have no other beast to common there, but those that are levant and couchant: And if a man grants *sans* number, the grantee cannot put in so many cattle, but so that the grantor may have sufficient common in the same land. 12 H. 8. 2. 15 E. 4. 32. b.

That a man may prescribe to have common for all manner of cattle by reason of his person. 15 E. 4. 33. Br. Com. 8. Vide 1 Roll. 366, 398. Br. Com. 48.

But if a man claims common by prescription for all manner of commonable cattle in the land of another, as belonging to a tenement, this it is said is a void prescription, because he does not say it is for cattle levant and couchant upon the land to which he claims it to be appurtenant, for a man cannot have common *sans* number appurtenant to land; and when he claims the common for all cattle commonable, and does not say for cattle levant and couchant upon the tenement, this shall be intended common *sans* number according to the words; for there is not any thing to limit it, when he does not say for levant and couchant; adjudged in error, *int' Cobham and White, Mich. 14 Car. Rot. 403, 404.*

Said to be naught upon a general demurrer, but that is helped after verdict, *int' Cheadle and Miller. Vide 1 Lev. 196. 1 Saund. 227, 346. 1 Vent. 164, 165. 1 Mod. 6, 7, 75. 3 Mod. 162. Co. Ent. 656. Cro. Jac. 44.*

But if a man prescribes for common for a certain number of cattle, as belonging to certain land, he need not say levant and couchant. 2 Mod. 185. See the diversity adjudged, and 1 Roll.

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Roll. Abr. 401. pl. 4. 1 *Vent.* 163. 1 *Mod.* 75.
Cro. Jac. 27.

It is doubted whether a corporation may prescribe, That every burghers of the said corporation hath time out of mind had common in gross *sans* number in a certain place for all their cattle; int' *Miller* and *Spateman*, 1 *Saund.* 345, 346. And that the chief justice positively said, There could be no common in gross *sans* number. *Vide* 1 *Mod.* 6, 7. *dubitatur*.

But 2 *Jones* 115. 2 *Lev.* 246. in an action between the same parties for a disturbance in the usage of the common, it seems to have been adjudged a good prescription. *Vide Hard.* 111. Yet *vide Co. Lit.* 122. this is one of the commons there enumerated: And 3 *Mod.* 209. *arguendo* admitted, but said, The prescription must not be laid to be *ad libitum suum*. *Et vide March* 83.

Prescription for common *omni tempore anni* * in a forest, &c. and it was not found to be a forest.

If in bar to an avowry for *damage-feasant* the defendant prescribes for the common in the place where, &c. *pro omnibus equis*, &c. and so justifies the putting in his gelding there; this is a good plea, for *equus* is a general name, and comprehends geldings as well as horses, and geldings in common speech are called horses, but for mares it is not so; adjudged. *Cro. Eliz.* 798. int' *Stapleton* and *Morse*.

If in bar of an action of trespass the defendant pleads, that he, and all those whose estate he hath

* See p.

in the manor of *M.* have time out of mind had pasturage for two geldings in the place where, and so justifies; this is a good plea, for such common may be claimed by the name of pasturage; adjudged. *Cro. Eliz.* 27. *inter Sir John Thornhill and Laffels.*

If a man in bar to an avowry for *damage-feasant* prescribes, That he, and all those whose, &c. have had common *pro magnis averiis* (for great beasts) in the place where, &c. and so justifies his putting in the geldings to use the common; this is a good plea: For *magna averia* may well be intended horses, oxen, kine, or such other beasts of these kinds which are commonable, and by the common phrase of people are well known amongst them, and there needs no averment that the gelding was one of the *magna averia*; adjudged. *Cro. Jac.* 508. *int' Standred and Shoreditch.*

But whether a man may prescribe for common *pro Magnis Averiiis*, viz. *pro Bidentibus*, &c. *1 Saund.* 227. *dubitatur.* And the chief justice said, Sheep were great beasts in respect of conies, &c.

Vide 2 Roll. Rep. 173. where the case of *Standred* is adjudged, and there said, That all manner of cattle, except sheep and yearlings, should be called *magna averia.*

If a man hath time out of mind had common of estovers in a certain place to be burnt in such a house, and to mend the old houses and old hedges; this is not common appendant, but appurtenant. *11 H. 6. 11 b.*

And if a man and his ancestors, and all those whose estate he hath in a house, have had common for two beasts in a certain place; this also is not appendant, but appurtenant. *11 H. 6. 12.*

By

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By *Holt* chief justice, a man may prescribe for common for cattle levant and couchant upon a messuage, but not for common appurtenant to a farm, because it is uncertain of what a farm consists, perhaps of ten acres, or of an hundred acres, but the prescription ought to be laid to a messuage and so many acres of land; but if there is an ancient farm, and the same lands always occupied with it, a man may have common of pasture to depasture his cattle, tilling that farm. *Lord Raym.* 726. *Hockley v. Lamb.*

Ruled by *Holt* chief justice, if a man prescribes for common for a certain number of cattle as appurtenant, &c. it is not necessary nor material to shew that they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained. *Ibid.* *Richards v. Squibb.* 2 *Lord Raym.* 1015.

In replevin the defendant justifies taking *damage-fesant* in his freehold; plaintiff in bar, that he is seised of a cottage, and prescribes for common in the defendant's land for all his cattle levant and couchant as appendant to his cottage; and held well on demurrer, for a cottage has a curtilage, or at least a court to it. 2 *Lord Raym.* 1015. *Salk.* 169.

Upon a grant of common by a deed of bargain and sale of *Blackacre*, which deed is afterwards inrolled; this was held a good common appurtenant to *B.* although the grantee had nothing in the land at the time of the grant; and though it shall not relate to settle the estate in him *ab initio*, inasmuch as this has reference to the bargain and sale, and to the estate which he had by force thereof. *Mich.* 15 *Jac. B. R. inter Gawen and Stacy.*

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And so it is where the grant of common had reference to that which a man should afterwards purchase; for it is not necessary that he should have the land at the time of the grant. *Ibid.*

So if a man bargains and sells *Blackacre* to *B.* and after, before the deed is inrolled, by another deed grants a common to the said *B.* for all the cattle which should manure and eat the said *Blackacre*, and after the deed is inrolled; this shall be a good common appurtenant to the said *Blackacre*; and the court said it should be so without any help of relation. *Int' easdem partes ut supra.*

So where a man grants to *B.* common for all cattle which manure *Blackacre*; and after he purchases it; this was said to be a good common appurtenant to this acre upon a contingent, tho' he had nothing in it at the time, &c. *int' easdem partes ut supra*; but here is made a *quære*, inasmuch as the grant had no reference to a future purchase. *Vide 1 Roll. Abr. 400. pl. 5, 6.*

H. seised in fee of a waste called *W. Heath*, granted to the prior of *S.* and his tenants in *S.* common in *W. præd'*, *Habend'* to them and their successors as tenants in fee; and this was said to be common appurtenant to the said land which the prior had in *S.* aforesaid, for that it could not be a common *sans* number, but referred to the land. *Inter Sacheverell and Porter, 1 Roll. Abr. 400. pl. 7. Gra. Car. 482. 1 Jones 297.* Adjudged upon a special verdict.

One granted to another a certain assart with common of turbary, as belonged to two hides of land, with the appurtenances in *D.* and this was said to be a common in gross, being a grant *de novo*,

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novo, not by prescription, and not appurtenant to the said assart; adjudged. 5 *Aff.* 9. *Fitz. Affrse* 134.

If *A.* as appurtenant to a certain messuage, and twenty acres of land, hath common in the land of *B.* and after *B.* enfeoffs *A.* of the said lands, in which, &c. by which the common is extinguished; and after *A.* releases to *B.* the said messuage and twenty acres of land, with all commons, profits and commodities thereunto appertaining, or occupied, or used with the said messuage; this is said to be a good grant of a new common for the time. *Trin.* 39 *Eliz.* int' *Bradshaw* and *Eyre*, *Cro. Eliz.* 570.

But because it was not there averred, that this common was therewith used at the time of the lease, it was adjudged against the defendant who claimed the common.

So if a copyhold messuage escheats, to which before common in the demesne of the lord did belong, and the lord by deed grants it by the name of a messuage, &c. and of whatsoever common to the said messuage belonging, &c. or with the same used. 2 *And.* 168. *Cro. Eliz.* 794.

If a man prescribes to have common of estovers to his freehold, *scil.* a house, he cannot prescribe to sell the wood, for this cannot be appurtenant. 11 *H.* 6. 11. *b.* *Vide Noy* 145. but must shew they are to be burnt or spent in the house. 1 *Sid.* 354. But he may prescribe to build new houses. *Cro. Jac.* 25.

So a man may prescribe to have as much turf yearly as two men can dig in one day. 1 *Lev.* 231.

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A man may prescribe to have common appurtenant to a manor for all manner of cattle. 14 H. 6. 6. b. And it is noted to be there said common appendant, which cannot be. *Vide 1 Roll. Abr.* 401. Letter *M.* pl. 2. *Fitz. Tref.* 33. *Br. Com.* 14.

So a man may prescribe to have common appurtenant to his freehold for all manner of cattle. 20 *Aff.* 8. *Bro. Com.* 41.

A man may prescribe that he and all those whose estate he hath in the manor of *D.* have used to have a fold-course, *scil.* a common of pasture for sheep not exceeding three hundred, in a field, *scil.* *C.* field, as appurtenant to the said manor; though he does not prescribe to have them levant and couchant upon the said manor, there being a certain number limited. *Mich.* 11 *Car. B. R. int' Day and Spooner.*

That a man may prescribe to have common appurtenant for his cattle not commonable; as hogs, goats, and such like. *Co. Lit.* 122.

A man may prescribe to have common appurtenant to his freehold for all manner of cattle, at every season of the year *; adjudged. 25 *Aff.* 8. *Br. Com.* 41.

That a man may prescribe to have common appurtenant for hogs levant and couchant upon such land. *Mich.* 5 *Jac. per cur'.*

How Common Appurtenant may be used.

He that hath common appurtenant cannot agist the cattle of a stranger. 13 *Ed.* 3. 37.

* See p. 239.

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But he may borrow sheep of another to compester his land, and with those he may use the common. 14 H. 6. Fitz. Tresf. 33. Br. Com. 14.

That a man may use a common appurtenant to his manor with cattle that are for his household. *Ibid.* Vide 1 Roll. Abr. 401. Let. N. pl. 2; 3. Br. Com. 14.

But he cannot use the common with cattle that are to sell. *Ibid.*

Of Common in Gros.

Common appendant cannot be made common in gros, for this is for cattle levant upon the land, to which, &c. and therefore it cannot be severed without extinguishment. 9 E. 4. 39. 26 Hen. 8. 3 Cro. Car. 542. That it may not by grant be severed from the soil.

So common appurtenant for cattle levant and couchant upon the land, cannot be made in gros for the aforesaid cause. Nevil 384. 19 H. 6. 33: 6 Br. Com. 33. But that common appurtenant for a certain number of beasts may be granted over. Cro. Jac. 14. *per cur'* adjudged, that it could not by grant be severed from the land, because he had it only *sub modo*, viz. for beasts levant, &c.

If *A.* and all those whose estates he hath in the manor of *D.* have had time out of mind a fold-course, *scil.* common of pasture, for any number of sheep not exceeding 300, in a certain field, as appurtenant to the said manor, he may grant over this fold-course to another, and so make it in gros, because the common is for a certain num-

ber; and by the prescription the sheep are not to be levant and couchant upon the manor: But it is a common for so many sheep appurtenant to the manor, which may be severed from a manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. *Mich. 11 Car. B. R. int' Day and Spooner, Cro. Car. 432. 1 Jon. 375. 1 Roll. Abr. 432. pl. 4. int' Mich. 6 Car. Ret. 183.*

But there the case was, whether it might be granted over with parcel of the manor, and so should be appurtenant to this parcel? And it is adjudged *in Banco*, that it should pass as appurtenant to this parcel; and so held *per cur'* in *B. R.*

That a man may prescribe to have it for all manner of cattle. *15 E. 4. 33.*

The grantee of common for a certain number of cattle cannot common with the cattle of a stranger. *18 E. 4. 14. b.*

If a lord licenses a stranger to put his cattle into the common, this shall be intended of commonable cattle only, and not of hogs. *2 Mod. 7.* But if the licence be for a particular time, it is otherwise. *Ibid.*

If in an action of trespass brought by a commoner against a stranger for putting his cattle into the common, whereby he could not have common in so large a manner; and the defendant pleads a licence from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, this is no good plea; though it may be objected, the plaintiff may reply thereunto, yet being the very gist of the action, the defendant should have pleaded thereunto: Adjudged *int' Smith and Feverel, 2 Mod. 6.*

But

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But in an action against the lord, the plaintiff must particularly shew the surcharge.

If a commoner have no cattle, he cannot agist the cattle of others to use the common. 45 E. 3. 25. b. Br. Com. 5. Br. Seisin 5. 22 Aff. 84. Br. Com. 40. Fitz. Aff. 228.

So he cannot command his tenants at will to use it with their cattle in his name. *Ibid.* ut *supra*.

But if he borrow other cattle to manure his land, he may use the common with them, for they are in a manner his cattle by borrowing; and the cattle which manure the land, of right ought to have common. 45 Ed. 3. 25. b. 22 Aff. 84, &c. ut *supra*.

If a man at all times have used common with his cattle couchant and levant in certain places, and not with other cattle; this is common appendant to this place, and not in gross. 22 Aff. 36. 13 Co. 66. Br. Com. 23.

If a man grant common to another for years, and do not declare in what place he shall have it, this is void. 9 H. 6. 36. Br. Grant 5.

If a man grants to another common *ubicunque averia sua ierint*, (wheresoever his cattle went) this is a good grant by averment, in what place his cattle fed at that time of the grant, before or after. 9 H. 6. 36. Br. Grant 5. Fitz. Com. 2. Br. Com. 3. But without such averment this is no good grant. 9 H. 6. 36.

Again, if a man make such a grant as above, yet if the cattle of the grantor did never feed in any place before the grant, or at the time of the grant or after, the grantee shall have no benefit of the grant. *Ibid.* Br. Com. 4.

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But if he grants common in that manner, and after he occupies and manures 100 acres of lands with his cattle, and after he becomes so poor that he hath no cattle, yet the grantee shall have the common in the 100 acres. *Ibid.*

So upon such a grant, if the grantor at the time of the grant or after, feeds his cattle in any place, the grantee may common there also. 9 H. 6. 36.

So upon such a grant of common, *ubicunque averia* of the grantor *ierint*, if the grantor put his cattle in his garden or in his corn, the grantee may put his cattle there also. *Ibid.*

But if there be such a grant, and the grantor dies, it is made a *quære*, if the grantee shall have common after his death? *Ibid.*

And if a man grants common to another for all his cattle throughout his manor, yet he cannot common in the garden of the grantor's parcel of the manor, but only in such places where a man of common right ought to common. *Ibid.* Br. Com.

But upon such grant he may common in any reasonable part of the manor, though not waste or common before; adjudged. *Cro. Car.* 599. For by the grant there is no restraint to the waste or common.

Again, if a man grant common to another, *quandocunque averia sua ierint*, (whensoever his cattle should go) the grantee shall not have common but when the cattle of the grantor are in the common. 9 H. 6. 36. *Fitz. Com.* 2. Br. 3. Br. Grant 5. *Hob.* 40. cited and agreed. *Cro. Car.* 599. But objected, that the clause, *quandocunque*, &c. is void, because it restrains all the ef-
fect

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fect of the grant. *Resp. eontra*, for *modus & conventio*, &c. And it is not intendable the grantor will forbear to put in his own cattle to defraud the grantee of his common. *Vide 1 Rep. 87.*

If one grants common to another in his land, every year that it lies fresh; this is good, though it be at my will, whether he shall have any profits, for I may sow it. 17 E. 3. 34. b.

And if A. grants common to B. in certain land for all his cattle, which shall be levant and couchant upon *Blackacre*, where B. hath nothing in *Blackacre*, so that it cannot be appurtenant; yet this shall not be a common in gross, because the intention and limitation of the grant is to cattle levant and couchant. Agreed int' *Gawen and Stacy, Trin. 15 Jac. B. R.*

That a man may grant to another common in one place for all manner of cattle, and in another place for ten beasts; and so the grantee may put the ten beasts in either of the two places. 17 E. 3. 34. b.

Seisin of Common, how obtained, &c.

A tortious user of common cannot put one in seisin. 45 E. 3. 25. b. *Br. Com. 5. Br. Seisin 5. 22 Aff. 84. Br. Com. 40. Br. Seisin 36. Fitz. Aff. 228.*

As a commoner cannot get seisin by cattle which he agists, for such user is not lawful; so he cannot gain seisin by the user of his tenants at will being his servants with their cattle, by his command, in his name, for their user with their cattle is tortious. *Ibid. ut supra.*

But if a commoner hath no cattle, and so takes the cattle of another, and the tertenant delivers seisin to the commoner, and is present when the cattle are put in, and he assents to the user and putting in, or commands him so to do; this is good seisin. 45 E. 3. 26. 22 Aff. 84. Br. Seisin 36.

So if the commoner hath no cattle, he may take seisin by the cattle of another, and chase them back presently; for the continuance is tortious, and this is said to be a good seisin. 45 E. 3. 26. Br. Seisin 5. Br. Com. 5. But Br. Com. 51. it is made a *quare*; and this seems not to be law, for the putting them in without continuance is tortious. 22 Aff. 24. Br. Com. 40. Br. Seisin 36. Fitz. 228.

If a man hath common *sans* number, if he hath been seised of this with cattle, without any certain number, as 20, 30 or 40; this is said to be a good seisin. 11 H. 6. 23.

That if a man recovers a common, and the sheriff upon a writ of seisin comes to the place, and by parol delivers to him seisin of the common; this is a good seisin of the common to have an assize. 22 Aff. 84. Br. Seisin 36. Fitz. Assize 228.

Where the seisin of the father is not sufficient for the heir. 45 E. 3. 25. Br. Seisin 5. 22 Aff. 84. Br. Seisin 36. Fitz. Aff. 228.

But the seisin of the lessee for years of a common is sufficient for him in reversion. 45 E. 3. 26. 22 Aff. 84. Fitz. Aff. 228. Br. Seisin 36.

What

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What Things a Commoner may do. See Bur. Rep.
264, &c.

For the interest and power of a commoner, and the general learning thereof; *vide Bridg.* 10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202.

¶ Where he may make one or more gaps to put in his cattle, if the common be inclosed. *Vide Golds.* 117. *Lit. Rep.* 38. 2 *Inst.* 81.

May throw down the hedges. 2 *Mod.* 65, 66. 1 *Brownl.* 228.

If the lord makes a pond in the common, the commoners may let the water out. 1 *Brownl.* 288.

If the lord of a common makes cony-borrows in the common, and stores them with conies; though he has no warren, yet the commoners cannot justify the killing the conies, that they may not increase to the prejudice of the common. Adjudged int' *Hodson and Griffel, Mich.* 5 *Jac. B. R.* *Vide Godb.* 123, 124. 2 *Bull.* 116. *Yelv.* 105. *Cro. Eliz.* 876. *Cro. Jac.* 229, 230. 1 *Brownl.* 227. 2 *Leon.* 201. 4 *Leon.* 7.

Again, if the lord of a common makes cony-burrows in the common, and stores them with conies, by which the commoners cannot have sufficient common; yet the commoners cannot justify the killing the conies, but ought to bring their assize or action against the lord, for they cannot be their own judges: *Sed dubitatur.* So *Bridgman* 9, 10, 11. *Dubitatur,* Whether a commoner may prescribe to kill the conies, so often as the common hath been oppressed. *Vide Cro. Jac.* 195.

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and *Yelv.* 104, 105. where the case of not killing is said to be adjudged. So *Godb.* 123. *Cony's* case. So 2 *Leon.* 201, 202. and 4 *Leon.* 7. adjudged, though it should be admitted the commoner hath no other remedy. *Cro. Jac.* 229, 230.

But it seems every one of the copyhold commoners, by prescription in the wastes of the lord, (if the lord stores the wastes with conies) may have an action of the case against the lord, averring, that by this his common is impaired. 1 *Roll. Abr.* 106. *Pl.* 19. *Ibid.* 405. *Pl.* 2.

And that an action lies, notwithstanding the king grants to the lord a free warren there. 1 *Jon.* 12. *Winch.* 16. *Palm.* 319. And accordingly, *Yelv.* 143. it was adjudged in an action by the heir of the commoner, for the continuance in his time. *Vide Cro. Jac.* 195. *Yelv.* 104, 105, &c. *Sed vide* 1 *Lutw.* 108.

Again it is said, that if the sheep of the commoners are killed, by falling into the said cony-burrows so made by the lord; yet they cannot justify the digging of the land, and stopping them for the cause aforesaid. *Trin.* 11 *Jac. B. R. sed dubitatur.* 2 *Bulst.* 115, 116. adjudged. *Cro. Jac.* 229, 230.

If *J. S.* hath land adjoining to the land of *J. D.* in which *J. N.* hath common of pasture, and *J. S.* makes coney-burrows in his land, and stores them with conies, which come into the land of *J. D.* *J. N.* who hath the common of pasture, cannot there kill the conies, because he hath nothing to do there, but to take the grass with the mouth of his cattle. Adjudged, *Mich.* 43 & 44 *El.*

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El. B. R. int' Bellowe & Loughdon. Vide 1 Roll. Abr. 90. pl. 9. Cro. El. 876. The action being brought by *J. D.* adjudged; for the coney is a beast of warren, and profitable as deer are, and not to be compared to vermin. *Owen 114. Cro. Jac. 195. Yelv. 105. 2 Bulst. 116. 1 Lutw. 108.*

Mich. 10 Car. adjudged *int' Eversby and Wilkinson in B. R.* Such a commoner brought an action upon the case against *J. S.* who, without any lawful grant or prescription, had stored the land adjoining with conies, by which the conies came into the land where he had common, whereby he lost his common; and adjudged that the action does not lie, and a judgment given *in Banco*, reversed accordingly in this case in a writ of error; and the court gave the reason, because here the commoner may kill the conies. *Vide Cro. Car. 387. 1 Roll. Abr. 90. contra 1 Jones 356.* same case adjudged, and the judgment reversed accordingly.

A commoner may justify the taking the cattle of a stranger *damage-feasant* upon the common in his own name, for the interest which he has in the common. *15 H. 7. 2. b. 11, 13. b. 14 H. 7. 3. b. 9 Co. Mary's case, 112. b. F. N. B. 128. c. 10 Ed. 4. 4. 15 H. 7. 13. b. agreed.*

But he can have no action, unless laid, *per quod* his common was impaired. *Keilw. 47. a.* But for this *vide 2 Co. 112, 113. 1 Brownl. 197. 2 Brownl. 55. 1 Roll. 89. pl. 8. Br. Com. 35, 39. Br. Justification 15.*

And if a copyholder, by the custom of a manor, has used to have common for all cattle levant and couchant upon his customary tenement, in a certain

certain place, parcel of the manor, and a stranger digs turfs there, and carries them away, by which his common is impaired, an action upon the case lies, declaring, That the defendant dug so many turfs there, and them with his horses and carts (the grafs then and there growing, treading down with his feet in walking) from the place aforesaid unjustly did take and carry away, whereby the plaintiff could not have his common for his cattle in so beneficial a manner as before he had; and this is said to be a good declaration. Though the commoner cannot have any damage for the taking and carrying away of the turf, yet the coming upon the land with his horses and carts to carry them, is a prejudice to the common. And there, *per quod* his common is impaired, is the cause of the action, and the carrying and taking them is a means of the impairing thereof. *Mish. 9 Car. inter Teary and Godier*, adjudged: This being moved in arrest of judgment upon such a declaration, the damages being intire. *Holland and Level* a like point, 2 *Brownl.* 148. 9 *Co.* 113. *Ca. Ent.* 9. *pl.* 8. 14. *pl.* 12. *Godb.* 343. 2 *Rall. Rep.* 308. *adjournatur.*

That trespass lies against a stranger for suffering his horses, &c. to eat, &c. the grafs, whereby he could not have his common in so beneficial a manner. 9 *Co.* 11. 2 *Brownl.* 55. *Jenk. Rep.* 144. by which book, though the old opinions are otherwise; yet an action will lie, else the commoner may be without remedy; for the cattle may be gone before he can take them *damage-feasant*. But he shall not have an action for every petit trespass; but for such only, whereby he could not have his common in such a beneficial manner.

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9 Co. 113. 1 Brownl. 197. Br. Com. 24.
Keilw. 47. 1 Roll. Abr. 405. pl. 5.

If there be a custom, that a close ought to lie fresh and hained every second year till *Lady-day*, after the corn cut and carried away, and J. S. hath used time out of mind to have common in the said close after *Lady-day*, till it is sowed again with corn, for his cattle levant and couchant upon a certain tenement, as appurtenant thereto; in this case, if the lord of the soil of the said close puts in his cattle in the said close against the custom, when it ought to lie fresh and hained; by the custom, the said J. S. though he be but a commoner, yet he may take the cattle of the lord there *damage-feasant*, and justify it in an action of trespass brought against him by the lord of the close where he took the cattle; for it will be the worse common, if the lord may eat the grafs before the common is to be taken by the custom: *Mich.* 14 Car. inter *Trulock* and *White*, adjudged; this being moved in arrest of judgment.

So where the lord by custom is stinted to a certain number of cattle, and yet he puts in more. *Yelv.* 129. *Vide Cro. Jac.* 208. 1 Brown. 187, 188. In which case some of the judges doubted, whether, as the stinting the lord was gained by custom, a custom and usage to distrain ought not to be alledged; but how far the lord may be restrained to a certain stint, *vide* 2 Roll. Abr. 267. Letter L.

It is said to be a general rule, that in other cases the commoners cannot distrain or chase out the cattle of the lord or tertenant *damage-feasant*; for which see 2 Leon. 203. *Yelv.* 104, 105, 129. *Cro. Jac.* 208. 1 Brownl. 187, 188. *Godb.* 182.

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A commoner in an action of trespass cannot justify his coming there, with an intent to put in his cattle there, if he does not put them in. Adjudged, *Pasch. 17 Jac. Br. R. int' Sir H. Spelman and Hermitage.*

But the commoner may justify his coming to see if the pasture in it be fit to receive his cattle. *Pasch. 17 Jac. B. R.*

If *A.* hath common of estovers in the woods of *J. S.* and *J. S.* cuts part or all the wood; yet *A.* cannot take any part of this which is cut, but shall be put to an assise or case, as his estate is. *Pasch. 17 Jac. B. R. ut supra. Cro. Eliz. 826. Cro. Jac. 257. 1 Roll. Abr. 567. Pla. 3. Yel. 188. 1 Brownl. 197, 200. 1 Bulst. 93, 94. Vide 9 Co. 112. 1 Brownl. 197. 1 Roll. Abr. 108. Pl. 12. 5 Co. 25.*

So if one grants to me 1000 cords of wood to be taken at my election, and the grantor or stranger cuts down all or part of the wood, I can take no part of that which is cut down. *5 Co. 25. Sir Thomas Palmer's case. Cro. Eliz. 820. Noy 31. Moor 692. Pl. 955. Yelv. 188.*

But if a man claims all the thorns, &c. growing in such a place, he may take them though cut down by another. *Cro. Jac. 257. Yelv. 188. 1 Brownl. 219, 220. 1 Bulst. 93, 94.*

If a common every year in a flood is surrounded with water, yet the commoner cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. *12 H. 8. 2. 13 H. 8. 15. D. 36 H. 8. 36. b. 39. Vide 2 Bulst. 116. Bridgman 10. Godb. 52.*

So

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So the commoner cannot cut bushes, fern, &c. which impair the common, (*Bridgm.* 10.) unless it be by special prescription; for if he makes any thing *de novo* in the land, he is a trespasser, but he may amend and reform a thing abused. And therefore if the land be full of mole-hills, he may dig them down. *2 Brownl.* 228. So if there be holes dug in the common to the damage of the land, they may put again the earth dug into its place.

Approvement of Common, concerning it.

By the order of the common law there could be no approvement, because the common issued out of the whole waste. *2 Inst.* 85.

By the common law, the lord might approve against any that had common appendant, but not against a commoner by grant. *2 Inst.* 474. *1 Roll. Rep.* 365.

By the statute of *Merton*, 20 H. 3. c. 4. because great men having enfeoffed others of small tenements in their great manors, complained they could not make their profit of the residue of their manors, as waste, woods and pastures; it was provided, when such feoffees bring an assise for their common of pasture, and it is alledged they have not sufficient pasture belonging to their tenements, ingress or regress, the truth shall be inquired by the assise; and if found they have not sufficient, &c. they shall recover seisin by the view of the inquest, and by their discretion shall have sufficient, &c. but if found they have sufficient, &c. the other shall make the profit of the residue, and be quit of the assise.

See

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See the explanation of this statute, 2 *Inst.* 85, 89. *Vaugh.* 257.

This statute extends only to enable the lord to approve against his tenants, (*i. e.* to enclose part of the waste, woods and pastures, for himself, and discharge it from being common) if he leaves common sufficient, &c. *Vide* 2 *Inst.* 85. This may be tried in an action of trespass. 2 *Inst.* 88. *Godb.* 117. But,

If the lord inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure. 2 *Inst.* 88.

It extends not to common of piscary, turbary, estovers, &c. 2 *Inst.* 87.

It extends not to common in gross. *Idem* 86.

When it is found they have not sufficient, the inquest shall find what is sufficient, that the lord may approve the residue. 2 *Inst.* 88. And tho' after it should prove insufficient, the improvement continues. *Idem* 87, 88. See after.

The improvement is to be made by inclosure, and not by digging for coals, &c. 2 *Inst.* 87. 1 *Sid.* 106.

And if the lord make a feoffment of part, his feoffee may inclose; for the feoffment in its nature was an improvement. 2 *Inst.* 17.

And thereby it is discharged of the common; and if the tenant purchase it, his common is not extinguished. *Ibid.*

But the lord cannot improve the whole, leaving them sufficient in other lands. 2 *Co.* 25. b.

By the statute of *Westm.* 2. (13 *Ed.* 1.) c. 46. the statute of *Merton* shall not only bind the lord's tenants but neighbours also, and such as claim common of pasture, as appendant or appurtenant to

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to their tenements, but not such as claim common by special grant or feoffment, for a certain number, or otherwise.

A neighbour is bound, though he dwell in another town, so the town and common adjoin. 2 *Inst.* 474.

And if the lord hath common in the tenant's grounds, the tenant may improve within this act. *Ibid.* And yet there seems as if the common of the lord was reserved upon the first feoffment. *Ibid.*

That by occasion of a windmill, sheep-cote, dairy, enlarging of a court necessary for curtilage, none shall be grieved by assise of *novel disseisin* for common of pasture. *Vide* same statute.

Note; It is said, these above are but for examples; for the lord may erect an house for the habitation of a beast-keeper. 1 *Inst.* 476. 1 *Lev.* 62. And it must be shewn that it was done for his necessary refiance. *Vide* 1 *Sid.* 97. 1 *Keb.* 283, 314. and whether of a necessary curtilage it should be an ancient one, *dubitatur*.

And none in such cases shall be grieved, though there be not sufficient of common left. 1 *Inst.* 476. 1 *Lev.* 62.

And where any having right to approve, levies dyke or hedge, and it is thrown down in the night or other season, &c. and it cannot be known by verdict of assise or jury by whom, and the men of the towns near will not indict such as are guilty of the fact; the towns near adjoining shall be distrained to levy the hedge or dyke at their own costs, and to yield damages.

It is said, that the cutting down of timber is not within the act. *T. Raym.* 487.

That

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That if the prostration in the day or night was before the face of the owners, or so publick, that the offenders may be known; it is not within the act. 1 *Lev.* 101. a traverse taken accordingly.

For the inquisition and other proceedings upon this act, *vide Cro. Car.* 280, 440, 580. 1 *Jon.* 307. 1 *Sid.* 107, 212. 1 *Lev.* 108. 1 *Mod.* 66.

And no time being appointed for the indictments, it is said it shall be intended within a year and a day. 2 *Inst.* 476. 1 *Roll. Rep.* 365. and *per Cro. Car.* 440. a convenient time.

That the lord shall bring his action upon this statute against the towns bordering round about the town where the fact was done; and judgment shall be given, That they shall at their proper cost make the ditch, &c. 2 *Inst.* 477. 1 *Roll. Rep.* 365.

And the above statute of *West.* 2. or 13 *Ed.* 1. c. 46. further enacts, That if any upon just title of approvement do make a ditch or hedge, for that purpose, which is afterwards thrown down by persons unknown, the towns adjoining may be distrained, to make such ditch or hedge at their own costs. [See 1 *Geo.* 1. c. 48. 6 *Geo.* 1. c. 16. See also 2 *Inst.* 474, &c.]

And *per* 3 *Ed.* 6. c. 3. the statutes of *Merton* and *Westminster* are confirmed, and treble damages given to the commoners that recover in assise against the lord.

See the *Stat.* 29 *Geo.* 2. c. 36. by which proprietors of wates, woods and pastures, and persons having a right of common of pasture thereon, may, by consent, inclose any part thereof for
planting

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planting or preserving of timber or underwood,
&c.

See also the Stat. 31 Geo. 2. c. 41. made to
amend and render more effectual the said act of
29 Geo. 2. c. 36.

Admeasurement of Common.

Concerning the admeasurement of common, and
where it lies, *vide F. N. B. 125.*

It lies by one commoner against another ; but
if the tenant surcharges the common, the lord shall
not have a writ of admeasurement against the
tenant. *Ibid. A. D.*

By 2 *Inst.* 86. It lies only for and against such
as have common appendant. But *Q. & vide F.*
N. B. 125. D. 1 Roll. Rep. 365.

Upon the suit of one commoner against ano-
ther, it is said all the commoners shall be admea-
sured. *F. N. B. 125. B.*

So if the lord surcharge the common, or ap-
prove without leaving sufficient, the tenant shall
not have a writ of admeasurement against him,
but an assise. *F. N. B. 125. D.*

That no writ of admeasurement lies against a
commoner *sans* number, nor shall his common be
admeasured. *Ibid.* But the tertenant may dis-
train his cattle. *1 Saund. 345.*

Vide 1 Lutw. 98. That one may prescribe for
common in a forest for sheep in the fence-month,
but may not prescribe for goats. *Idem 81.*

An agreement for inclosing the common, and
sharing it among the parties, decreed to be per-
formed ; but decreed also, That if there were any
persons who had interest in the said common,
who

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who were not parties to that agreement, they should not be prejudiced thereby, but that it should not be in the power of one or two wilful persons to oppose the publick good. *Cases in Chancery*, 1 Par. f. 48, *Tiverton against Collier*.

Where one has a right of common in a common field, from the time the grain is carried off, until it is sown again; the sowing of a small parcel of such field shall not oust the commoner from taking his common in the residue of the field. *Mich. 8 Jac. 1. B. R. Trulick and Riggesby, Yelv. 185.*

Vide a custom of a manor for the reeve to make a drift of the cattle at any time by the appointment of the steward. *Lord Raym. 1186, Follet v. Freak and others.*

C H A P. VIII.

Several Observations upon the Statute 29 Car. 2. which was made to prevent Frauds and Perjuries, and relates to Bargains in buying and selling Goods and Chattels.

FIRST, it is to be observed, That no leases, estates or interest, either of freehold or terms of years, or any uncertain interest, (not being copyhold or customary interest) of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing,
signed

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signed by the parties so assigning, &c. or their agents thereunto lawfully authorized by writing, or by act or operation of law.

Also, that no contract for the sale of any goods, wares, merchandizes, for the price of ten pounds sterling, or upwards, shall be allowed to be good;

Except the buyer shall accept part of the goods so sold, or actually receive the same;

Or give something in earnest to bind the bargain, or in part of payment;

Or else that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contracts, or their agents thereunto lawfully authorized:

And if so done, the action for the money may be brought any time within six years; (or after six years, if an original writ be sued out within six years.)

Also, That no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof:

Nor whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate:

Or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person:

Or to charge any person upon any agreement made upon consideration of marriage:

Or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them:

Unless the agreement, upon which such actions shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party

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party to be charged therewith ; or some other person thereunto by him lawfully authorized.

So that if the agreement be for goods, wares or merchandize, under the price of ten pounds ; yet if by that agreement they be not to be delivered within a year.

That agreement seems to be void, unless put in writing, and signed by the party to be charged thereby.

And though earnest be given upon such an agreement, not to be performed within a year, it seems it will not help. *Prec. in Chan.* 560.

Also if the contract be for goods, &c. above ten pounds ; and though earnest be given, or part of the goods received ; yet if the remainder be by such contract to be delivered after a year, this contract (unless put in writing, and signed) it seems will not bind for the remainder. *Prec. in Chan.* 560.

And so if the agreement or promise be to do any other thing or things that are not to be performed in a year's time from the making, it will not be binding unless such note or *memorandum* be made.

But if no such day is set, or the time is uncertain, as to pay so much at the day of death, &c. it is otherwise ; for it does not appear but that might happen within a year. Agreed by all the judges on a case put by *Treby* chief justice. *Skin.* 326. *pl.* 4. 353. *pl.* 1.

Again, if any person promises to pay the debt of another person, or to answer for the default or miscarriage of another person :

As if he should say, Trouble not such a man, and I will pay you the debt he owes you :

Or,

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Or, Trust such an one; and if he don't pay you, I will: *Lord Raym.* 224. 2 *Lord Raym.* 1085, 1087. See 12 *Mod.* 250.

Or, if he don't do such a thing, I will make you satisfaction. See *Bac. Abr.* 75, 76.

These promises, as aforesaid, without a note or memorandum under hand, will signify nothing, tho' it was at his request, and though you may alledge and shew a good consideration for it.

Also, if the agreement be upon some consideration of marriage;

As, I will give you so much if you will marry my daughter or kinswoman, &c.

Here the marriage is made the consideration, and so void without writing.

But to say, I will give so much for such a horse at the day of my marriage; this is otherwise, and good without note; for the horse, in this case, is the consideration of the promise.

But the clause relating to marriage, does not extend to a promise to marry, as well as to the payment of marriage portions, and therefore a parol promise of marriage is good. *Skin.* 196. *Lord Raym.* 387. 2 *Eq. Caf. Abr.* 248. *Stra.* 34.

And if it be about the sale of lands, tenements or hereditaments, or any interest therein, it must be put in writing under hand, as aforesaid.

As if a man promise to sell you such a house, piece of land, or the like:

Or to make a lease for years, or life, of any lands or tenements; it will not bind without writing, &c.

And lastly, not to charge any executor or administrator upon any special promise to answer damages, &c.

As if an executor or administrator says to one that is about to sue him for money owing by the testator, &c. Forbear your suit, and I will pay your debt. This promise will not bind to make him answer damages of his own estate, unless it be put in writing under hand, &c. See *Bac. Abr.* 75.

1. Therefore every agreement not to be performed within a year ;
2. Every agreement with an executor concerning the testator's estate ;
3. Every agreement to pay the debt, &c. of another person ;
4. Every agreement where marriage is the chief consideration ;
5. Every agreement concerning the sale of lands, &c. must be put in writing, and signed by the party to be charged.

So that in the particulars above named, it is absolutely necessary that there be some note or memorandum to make good such contract, promises and agreements.

Note, That by *Stat. 7 Jac. 1. 12.* None keeping a shop book, his executors or administrators, shall be allowed to give it in * evidence for wares or work above one year before the action brought, unless they have obtained a bond or bill for the debt, or brought an action for the money

* This act shews very great ignorance of the common law, though one should imagine that no one but a lawyer could have proposed the bill, for a tradesman's shop book never could be allowed to be evidence for him in any court of law, if no such declaratory statute had passed. *B. r. Observ. on Stat. 2d Edit. 421. in Notes.*
within

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within one year next after the wares delivered, or work done.

But this act is not to hold place between merchant and merchant, tradesman and tradesman, or merchant and tradesman, for any thing falling within the compass of their mutual trades and merchandize.

Concerning Notes promising Payment.

It may here be proper to observe, that by the * statute 3 & 4 Ann. c. 9. all notes signed by any person, &c. whereby any such person, &c. shall promise to pay another person, &c. or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable.

And also, such note payable to such person, &c. or order, shall be assignable over, in manner as inland bills of exchange are. And the person to whom such money is payable may maintain an action for the same, as they might upon such bill of exchange. And the person, &c. to whom such note so payable, or order, is assigned or indorsed, may maintain an action against the person, &c. who signed, or any who indorsed the same, as in cases of inland bills, and recover damages and costs of suit: And in case of nonsuit or verdict against the plaintiff, the defendant to recover costs against the plaintiff.

See more in the statute concerning drawing, accepting and protesting inland bills.

* Perpetuated by Stat. 7 Ann. c. 25. s. 3.

C H A P. IX.

Several necessary Matters relating to Farmers, and such as keep and feed Sheep, and other Beasts; and also relating to Actions for Nuisances done by one Tenant to another, &c.

BY 25 H. 8. 13. None shall receive or take in farm for term of life, years, or at will, by indenture, copy of court-roll, or otherwise, any more houses or tenements of husbandry, whereunto any lands are belonging, in town, village, hamlet or tithing within this realm, above the number of two such holds or tenements; and they are to be situate in the same parish where he dwells, on pain to forfeit to the king and informer three shillings and fourpence for every week he takes the profits of them.

By Stat. 21 H. 8. 13. No spiritual person shall take to farm to himself (or to any other for his use) any lands or other hereditaments for life, years, or at will; on pain to forfeit ten pounds for every month he so continues the same, to be divided betwixt the king and the prosecutor.

But this act not to extend to any spiritual person, for taking any archbishopricks, bishopricks, abbies, priories, or collegiate, cathedral, or conventual churches; nor to any such person who shall tender or make any traverse upon any office concerning his freehold.

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The said act also provides, That no spiritual person shall take in farm any parsonage or vicarage; on pain to forfeit 40 s. for every week that he, or any other for his use, so occupies the same, and also ten times the value of the profit or rent that he makes thereof; both which forfeitures are to be divided betwixt the king and the prosecutor.

See after.

Also by 25 H. 8. 13. None shall keep in his own possession, at any one time, above two thousand sheep; on pain to forfeit for every sheep above that number 3 s. 4 d. to be prosecuted for a subject within one year, and for the king within three; but here lambs shall not be accounted as sheep till *Midsummer* twelvemonth after their fall.

And if any happen to have more sheep than two thousand, by reason of any executorship or marriage, they shall not be impeached by this law, so that in one year after they put off so many, that at the end of the year they may not have above two thousand: Neither shall a child, (during his nonage) nor any person for him, be endamaged by this act, which child shall have by legacy above two thousand sheep given him.

But every temporal subject may keep (upon his own demesne lands) as many sheep as he will, or for the maintenance of his house, above the number of two thousand, notwithstanding this act.

A thousand sheep meant by this statute shall be accounted after the rate of sixscore to the hundred.

Justices of the peace have power to hear and determine the offences committed against this act, but shall not take a less fine than is limited by the same.

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And by the statute of 2 & 3 P. & M. c. 3. Whosoever shall feed above one hundred and twenty shorn sheep for the most part of the year upon his grounds, which be several and apt for milch kine, and not commonable, and shall not for every sixty sheep keep one milch cow; and moreover, for sixscore sheep yearly rear one calf during the time of keeping such sheep, shall forfeit to the qucen and informer for every cow not kept, for every month 20 s. and as much for every calf not reared.

Also, whosoever shall feed upon his several pastures, above twenty oxen, ronts, steers, scrubs, heifers, kine, and shall not for every ten beasts keep one milch cow, and for every two kine wean and rear up yearly one calf, (except it die) shall forfeit as before; the suit to be commenced within one year after the offence committed, and not to bind such as keep sheep, or feed beasts for their own provision. Justices in their sessions have power to hear and determine the breach of this statute.

By Stat. 27 H. 8. c. 6. Every one having inheritance or freehold in a park kept for deer, which is a mile about, or his farmer, shall keep two mares, apt and able to bear foals, each of them being thirteen hands high, from the lowest part of the hoof to the highest part of the shoulder, and each containing four inches; on pain of 40 s. for every month they want them; and if the park be four miles about, they shall keep four mares upon the like pain.

If any of the mares die, they have three months given them to provide another, without danger of incurring the said penalty.

They

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They shall not suffer their mares to be leapt by any stone-horse under fourteen hands high, on pain of 40 s.

The said forfeitures are to be divided between the king and the prosecutor.

This act not to extend to *Westmorland, Cumberland, Northumberland* nor bishoprick of *Durham*, nor to the parts wherein the inhabitants of the town next adjoining have common.

Spiritual persons may sell the increase and breed of their mares, notwithstanding this act.

And by 32 *H. 8. c. 13.* (in order to preserve the breeding of strong horses) no stone-horse above two years old, and under fifteen hands, every hand four inches, to be put into forests where mares are kept; upon pain of forfeiting the horse.

Several Actions on the Case, necessary to be known by all Farmers, &c.

If one disturb another in his way to a house or land, by stopping or straitening of it, or stop or turn his water coming to his house, mill or ground, or the light to his house, or if one stop a ditch or river, or set up flood-gates, so as to make the water overflow and drown his ground adjoining, he may have an action of the case against him for it. See after, highways, private ways, &c.

But if a man stop or turn water only to amend his bank or mills, having by custom or use done it, this is justifiable. 4 *Co.* 86. 1 *Co.* 50. *Lit. Rep.* 267. 1 *Vent.* 274. 2 *Vent.* 138, 185, 288, &c.

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If one stop a stream of water, and put it out of its old course, and by that means my ground is drowned, I may have an action. *New Book of Entries*, f. 18. *Dyer* 248.

Where I have an ancient mill, and an ancient water-course to maintain it, if any man shall divert it, that I cannot have the use of it to my mill as formerly, I may have an action on the case against him. *Style's Rep.* 370. 4 *Co.* 86. *Vide* 3 *Lev.* 133. 1 *Mod. Rep.* 48.

If one disturb me in my walk, fold or foldage, watering-place, church-way or high-way, isle or seat in the church, or any other profit appendant, which I have had time out of mind, as belonging to my ancient house by prescription, I may have an action. 4 *Co.* 32, 89. 5 *Co.* 1, 76. 12 *Co.* 105. *Bulst.* 47, 69. 2 *Bulst.* 14, 129. *Bendl.* 89.

Action lies for not folding sheep on the plaintiff's land, whereby the plaintiff lost the benefit of foldage. 2 *Vent.* 138.

If one disturb me in my common, that I cannot have it as liberally as formerly I have had, an action lies. *Style's Rep.* 164. 1 *Cro.* 390. *Heth.* 143.

If one dig a pit in a place where I have common, by occasion whereof my beast there going falls into it, and is hurt, I may have an action. 2 *Cro.* 158. 1 *Vent.* 195.

If one inclose land which should lie open in a manor, by which the commoners have not enough for to common their cattle, or eat up the common so much that the commoners have not enough; in this case it is said every commoner may have his action against him. *F. N. B.* 145. 9 *Co.* 113.

If

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If the inhabitants of a parish have a watering-place by prescription, and be disturbed in it, each of them (as it seems) may have an action for such disturbance. 27 H. 8. 27. *Finch's Ley* 177.

If the lessor out me that am an executor of the lessee for years, or my executors after me, of the term, each may have an action on the case, or an *ejectione firmæ*. 4 Co. 94.

If the lessee keep out his lessor, coming to view his house; if any waste be done, the lessor may have an action of waste against him. 2 Cro. 478.

If a lessee for life make a lease for years, and the lessee for years commits waste, for which the lessee for life is punished; in this case he may have an action against the lessee for years, and recover as much as the lessor doth or may recover of him. *Pasch. 38 Eliz. B. R. Gemmie's case*.

So if the lessee for years of a house lease it for part of the time, and that time expire, and the lessee continue in full possession, and pull down part of the house, the first lessee may have an action of the case against him. *Trin. 6 Car. 1. B. R.*

If my lessor that is bound by law to repair my house, or to pay subsidies or the like, neglect it, and I suffer thereby, I may have an action on the case against him. *Dyer 36. pl. 37. 21 H. 7. 12.*

So the lessor may have this action against his tenant at will, for voluntary waste committed by him; but not for negligent or permissive waste. 5 Co. 13. *Dyer 121. 14 H. 8. 12.* and therefore it has been adjudged, That where a tenant at will suffered the house to be burnt by the negligent custody of his fire, this action would not lie against him. *Cudlip and Rundle, Trin. 2 W. & M. Rot. 646. Carth. 203.*

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But an action on the case lies against tenant by *elegit*, who holds over, or cuts trees after the money tendered. 21 E. 3. 16.

If the lord cut down the copyholder's trees without his leave, (or else a special custom of the manor to enable him to it) the copyholder may have case against the lord for it. *Mich.* 3 *Jac.* B. R. *Cross* and *Abbot*; and *Trin.* 17 *Jac.* by justice *Haughton*, and this notwithstanding he leaves the loppings of them.

Also, if the lord cut down any tree of his tenant that is to have the lops, and take it away, case lieth. 1 *Brownl.* 97, 213.

If the lord cut down all the copyholder's trees, and not leave him fire-wood, &c. tenant may have case against him. *Brownl. ibid.* 141, 197, 298. 2 *Brownl.* 57, 331.

If the tenant refuses to grind at the lord's mill, as hath been used time out of mind, action lieth against him. 1 *Vent.* 167. 2 *Vent.* 292. 1 *Saund.* 215.

For voluntary firing his house, whereby my house is burnt, *vide Bendl.* 153. and 3 *Lev.* 359.

See the acts at the end of this treatise.

If one be time out of mind to repair a hedge between my close and his, and he let it be unrepaired, that my cattle go into his or other mens grounds, or other mens cattle go into my ground, by reason of which I have damage, I may have action of the case for it. 2 *Cro.* 699. 20 *Jac.* B. R. See 1 *Vent.* 264, 274, 275.

So if one be to repair or scour a ditch, and do it not, by which my land is drowned, or I have any special damage, case lieth against him. *F. N. B.* 93. G. 11 *H.* 4. 28. Action, &c. 30, 34, 36.

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If one be to repair a wall, or bank of a river, and do it not, or doth it not sufficiently, whereby my land is drowned, I may have an action *sur le Case*.

But in these cases, and such like, I must aver some special damage to me, by the not doing thereof. *Trin. 20 Jac. B. R. 2 Bulst. 280.*

Also an action of the case will lie for me against him which ought to repair a mound or bank of the sea, or of any great river, and doth it not, by which my land is drowned; so of the bank of a river. 29 *Ed. 3. 32. 12 H. 4. 7. 15 Ed. 4. 18.*

Note; But if the breach and inundation be by any extraordinary accident, as by tempest, or the like, no action lieth. 10 *Co. 139.*

If the highway be to be repaired by any special person, and is not, and I have any special damage thereby, I may have case for it. 5 *Ed. 4. 3.*

If there be a charge upon any man, by reason of the tenure of his house or land, to repair any private way, bridge, gutter, or the like, and he doth it not, and thereby I have any special damage, action lieth against him. *Old Book of Entries, f. 10.*

So I may have an action on the case against one for not repairing of a house ready to fall on my house. 22 *H. 7. 98. pl. 4.*

If one have a room over me in a city, or other place, and so carry himself in it as to annoy me that am under him; as if he have a shop or warehouse over me, and I have a cellar under it, and he lay such an extraordinary weight of goods more than usually have been, and so break it down

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upon me, I may have case against him for it. *Poph.* 46.

If I have a building beneath, and another man a building above me, and I suffer mine to decay so as to hazard his, or he suffer his to decay so as to hazard mine, each of us may have an action on the case against the other. *Keilw.* 48. See 1 *Brownl.* 4.

If a man doth over-build my house, so that his house-eaves do drop upon my house, and cause it to perish, or trouble my dwelling, I may have an action on the case against him. 14 *Brownl.* and *Goldsb.* 4.

If a man set up a house upon a new foundation so near to my antient house, that thereby he stops up my windows, and takes away my light, the air and prospect, I may have an action on the case. For a man may not in *London*, or elsewhere, enlarge his house in breadth or length to stop his neighbour's light; but upon an antient foundation he may build it as high as he will; for *cujus est solum, ejus est usque ad cælum.* 5 *Co.* 10. 9 *Co.* 55, 56. See after; and see the act for re-building of *London*.

If a man shall build or set up a wall against the window or light of my house, I may have an action against him, albeit he build upon his own ground. So if he set up a wood-pile upon his own ground to stop up lights, I may have an action. 9 *Co.* 54. 5 *Co.* 108. But if it prevents my prospect only, no action will lie for this. *Co.* 8. 57. 1 *Mod. Rep.* 55. *T. Raym.* 87. 1 *Sed.* 167.

But if two men be owners of two parcels of land adjoining, and one of them build a house on his land, and make windows and lights looking into the other's lands, and this continueth thirty
or

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or forty years, the other may build or lay any thing upon his own land, and stop them. 1 *Cro.* 118, 129. 1 *Bulst.* 116.

If one house be built hanging over another wrongfully, and after they came both into one hand, the wrong is now purged; so that if after they come into several hands, neither party is to complain of the wrong done before. *Hob.* 173.

Note; The erecting of a dye-house, tan-house, brew-house or lime-kiln, may be a nuisance to a neighbourhood, by which if I have any considerable offence in the smell to my health, or by the smoke to our bodies that live in the house, or to trees of the garden or yard, I may have an action of the case for my relief. *Pasch.* 5 *Jac. B. R.* 5 *Co.* 73, 101, 108. 9 *Co.* 54.

If one sets up a pig-sty under my house, and keeps pigs in it, or house of office, and use it so near to my house that the smell thereof doth annoy me, and hazard my health, &c. I may have an action. 5 *Co.* 73, 101, 108. 9 *Co.* 54.

So the keeping of a chandler's or butcher's shop so near my house, in a place inconvenient, to the offence of me in my garden or house, may be such a nuisance for which I may have an action. *New Book of Entries*, f. 11. *Trin.* 13 *Car. B. R.* 5 *Co.* and 9 *Co. ut supra.*

But if such a man shall set up his trade by me, though this be offensive to me, by the laying of stinking heaps at his door, and the like, I can have no action for this, unless it be very great, and much offensive. 1 *Cro.* 367. 13 *H.* 7. 26. yet this is indictable. So if a man erects buildings near the king's common highway, and near dwelling houses; and there makes acid spirit of sulphur,

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ulphur, whereby the air is impregnated with
noisome and offensive stinks, &c. *Bur. Rep.*
333.

If one throw a beast dying of the murrain, or
the intrail or offal of it into my ground, whereby
my beasts are infected and die, I may have case
against him. *Style's Rep.* 50.

If one set out his tithes duly, and the parson
will not take them away in convenient time, ac-
tion lies. *Lord Raym.* 187. *Stra* 245.

So if one that hath bought hay on my ground,
or in my house, and suffer it to lie long, whereby
I am damaged. *Godb. Rep. pl.* 424. *Et sic de*
fumilibus. Quære.

C H A P. X.

*Some further Observations relating to Covenants
in Leases, &c. With several modern re-
solved Cases relating to Pleadings in Cove-
nants upon Leases.*

A Covenant is either expressed in the deed or
implied by law; as by the words *demise* or
grant, the law doth imply and intend that the lessee
shall quietly enjoy during the lessor's life. 4 *Co.*
8. *Dyer* 338.

A covenant may be in the affirmative, or in the
negative, and it may be executed, that is of a thing
already done; executory, *i. e.* of a thing that
shall be done hereafter: But if it be of a thing
present, it may be void; as if I covenant that my
house is yours, this is void. *Plowd.* 330.

Cove-

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Covenants made by deed poll are as good and effectual as those made by deed indented, so as the party have the deed to ; shew but covenant doth not lie upon a verbal agreement, neither can it be grounded without a writing, except by some special case, as in *London. 3 Co. 63.*

There needs no great formality in the words to make a covenant; for if the words of a deed run thus, *That the lessee shall repair, provided always, that the lessor shall allow timber ; or That the lessee shall scour ditches, provided that the lessor do carry away the earth ; also, That the lessee shall pay twenty shillings a year rent ; or, That the lessee shall not alien,* and the like ; these are said to amount to good covenants on 'both sides, &c. *Dyer 57, 150. 2 Co. Lord Cromwel's case.*

But regularly in all cases, where words that do begin the sentence be conditional, or have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant : Yet if words of condition and words of covenant be coupled together in the same sentence, (as, *Provided always, and it is covenanted,* and the like) in such cases the words may be construed to make a covenant and condition both. *Bro. Cov. 21, 26, 38.*

And note ; That where a covenant is penned conditionally, and so as one thing is the cause of another, (as if one covenant to pay me 10 l. if I serve him a year ; or to new build a house so as he may have the old materials) in all these cases, if the cause or condition be not observed, the covenant shall not be performed. *Co. Lit. 204. Dyer 371.*

Where

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Where the substance and matter of a covenant to do any thing is lawful, such covenant is good ; and generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also.

But if the matter required to be, or not to be done by the covenant, be unlawful in the substance thereof, then is the covenant void, and doth not bind : So if the covenant be impossible. *Dyer* 6, 13, 324, 251, 253.

A covenant is to be always most strongly taken against the covenantor, and most in advantage of the covenantee.

To be taken according to the intent of the parties.

When no time is limited for the doing of a thing, it shall be done in reasonable time. *Plow.* 287.

Any one that is party to the deed to whom the covenant is made, may take advantage of the covenant, but not a stranger.

As if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he doth it not ; *B.* and not *C.* must sue him upon this breach.

And regularly all those that do seal and deliver the deed, and are named and bound by the express words of the covenant, (whether it be collateral or inherent) are bound by the covenant contained in the deed.

And therefore if heirs, executors, administrators or assigns, be named in the covenant, for the most part they are bound by the covenant.

And in all cases of inherent covenants, (*i. e.* that tend to the support of the thing granted) where a man doth covenant for himself only, and doth

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doth not name his executors and administrators, or either of them; yet they are bound, and may be charged by the covenant notwithstanding; and in some cases the law is so also for collateral covenants.

And in most inherent covenants, such as have the land, albeit they be neither executors nor administrators, or either of them, but assigns, &c. shall be charged by the covenant, though they be not named; for these covenants are said to run with the land. 5 Co. 16, 17, 18.

Where the deed itself, wherein the covenants are contained, or the estates on which the covenants do depend, is gone and determined, there regularly the covenants are gone also.

But the surrender of a lease doth not discharge the breach of covenant, which was before the surrender. *Dyer* 10.

Where a covenant is become impossible to be done by the act of God, by this the covenant is discharged; as where *J.* covenants to serve *B.* seven years, and dies before the seven years be expired. 1 Co. 98. *Plow.* 286.

Where there is an express covenant in a deed for quiet enjoyment, the implied covenant is gone. 2 Co. 80.

By a release of all covenants from the covenantee, the covenant is discharged, so as the release be by deed, for a covenant by deed cannot be discharged by word. Therefore if *A.* covenants with *B.* to build a house by a day, and in the mean time *B.* doth bid or desire him to let it alone; this doth not discharge the breach of the covenant; but the lessor may sue for it notwithstanding. *Pasch.* 6 Car. B. R.

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Note; If there is only a hand to a writing, and not a seal, covenant lies not, but ease upon the agreement; and you declare, that in consideration the plaintiff had promised to perform the agreement on his part, the defendant promised to perform on his part, &c. and then assign the breach, &c.

Where in a covenant, the latter words being general, shall be restrained and expounded by the former which were special, *vide Saund. Rep. 1 Par. fol. 59, 60.*

Where in a covenant the former general words shall be restrained and expounded by the latter special words. *Idem 59.*

In covenant, the former general words, That the original lease is indefeasible, shall not be restrained by the latter words, That the assignee *haberet, teneret & gauderet*, &c. without any let, &c. of the assignor. *Id. 60.*

A particular covenant in a deed may restrain a general covenant in law. *Ibid.*

Covenant that he was seised in fee, (notwithstanding any act done) and that the lands were of the yearly value of 260*l.* there the words *notwithstanding*, &c. may not be applied to the covenant concerning the value. *Ibid.*

What action of covenant lies for an assignee of a reversion at common law. *Id. 238, 239.*

Action of covenant by an assignee of a reversion against the lessee for rent, need not be laid in the county where the land lies. *Idem 239, 240, 241.*

An action lies for a lessor or his assignee against the lessee, upon his covenant for payment of rent, notwithstanding that the lessor or his assignee had accepted rent before of the assignee of the first lessee ;

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lessee; for covenant is not like an action of debt for rent. *Idem* 240, 241.

If by a deed sealed by both parties it is agreed, that the defendant shall give the plaintiff such a sum for all his lands in *A.* it will amount to a covenant on the part of the plaintiff to convey the land. *Idem* 230.

Where covenant lies upon the word *demise*, and where not. *Idem* 321, 322.

Where covenant lies for *misfeasant*, but not for *nonfeasant*. *Idem* 322, 323.

If a man by deed grant a water-course, and stop it, the grantee may have an action of covenant. *Idem* 322.

If one of the parties covenant to assure lands, and the other, in consideration of the same covenant performed, covenant to pay a sum of money, he is not obliged to pay the money until the lands be assured.—But it is otherwise if the covenant had been in consideration of the covenant to be performed. *Saund. Rep.* 2 Par. 156.

Where, in mutual covenants the words, *In consideration of the performance thereof*, shall make a condition precedent, and where not. *Idem* 156, 157.

If the covenant of the one part be negative, and the affirmative covenant on the other part be in consideration of the performance thereof; although the negative covenant is broken, yet the affirmative covenant ought to be performed. *Idem* 157.

A negative covenant is not said to be performed until it become impossible to break it. *Ibid.*

In covenant upon a warranty of lands for years, the plaintiff ought to shew what estate or right he
that

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that entered into the lands had at the time of his entry ; and it is not sufficient to aver, that he had a good title. *Idem* 178, 179, 180, 181.

What warranty shall be taken only for a covenant. *Idem* 180.

An action of covenant lies against a woman upon a warranty by her and her husband, annexed to her estate for years in a fine. *Idem* *ibid*.

Where, by the grant of a reversion, the rent reserved upon a lease for years is well transferred to the grantee, the law transfers also to him the covenant of the lease for the payment of it, as incident to the rent. *Idem* 371.

If in an action of covenant any breaches are well assigned, and others ill, and the defendant demurs to the whole declaration, the plaintiff shall have judgment for those breaches that are well assigned, and for the residue he shall be barred. *Id.* 380.

By *Stat. 8 & 9 W. 3. c. 10.* In all actions in courts of *Record* upon any *bond* or *penal bill* for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury at the trial shall assess *damages* for such breaches so assigned, as the plaintiff shall prove broken, &c.

If judgment is given for the plaintiff upon *demurrer*, *confession* or *nil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit, upon which shall issue a writ, to summon a jury to appear at the *assizes* of that county, to enquire into the truth of every one of such breaches, and to assess damages accordingly ; and the justices of assize shall make a return thereof to the court from whence the same issued.

In case the defendant, after such judgment entered, shall pay into court such *damages* assessed
and

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and costs of suit, a stay of execution shall be entered of record. Or if, by reason of execution executed, the plaintiff, &c. shall be paid such damages with costs, the body, lands and goods of the defendant shall be discharged, and the satisfaction entered upon record. Yet such judgment shall stand and be as a further security, to answer the plaintiff, his executors, &c. such damages as shall be sustained for further breach of any covenant in the same deed or writing contained, &c.

At common law the jury may find the penalty, but relief may be had in equity.

Resolved Cases as to pleadings in Covenant upon Leases.

In covenant against an assignee for not repairing a house, defendant pleaded in bar an accord between him and the plaintiff, and execution of it in satisfaction of the reparations. It was objected, That neither arbitrament, nor accord with satisfaction, is a plea, when an action is founded upon a deed, because matter *in fait* cannot be avoided by matter *in pais*; so when an action is in realty, or mixt with the realty, accord with satisfaction is no plea, and is not a bar for the personalty; but it was adjudged that the plea was good: And a difference was taken, where a duty accrues by a deed in a certainty, as by covenant, Bill or obligation to pay a sum of money; there, because it takes its essence by writing, it ought to be avoided by matter of as high a nature; but when no certain duty accrueth by the deed, but a default subsequent gives only damages, there accord with satisfaction is a good plea. 6 Co. *Blake's* case.

Vide

Vide 2 *Keb.* p. 51. The court held, That an accord was a good plea to a covenant to pay a sum certain, or an obligation when joined with other things uncertain. But concord after the deed cannot be a bar to such covenants as were not broken. 2 *Roll.* 187, 188.

Moved for a repleader in an action of covenant, to perform articles and payment of money, where-to the defendant had pleaded payment of the money after the day, which the plaintiff accepted; and because it was not pleaded by way of accord and satisfaction of the covenant wherein damages also are recovered, said to be ill. And this issue being insufficient, and found for the defendant, it is not aided by the statute of *Jeofails*. And by *Twisden*, payment pleaded to a single bill, if found for the plaintiff, he shall have judgment; if for the defendant, there shall be a repleader; *sed adjournatur*. 1 *Keb.* 210. *Vide* 3 *Cro.* 445. pl. 2. *Goldsb.* 100. pl. 11.

In covenant brought against a lessee for years, for not keeping the house in repair, the defendant pleaded in bar, That the house was burnt by casualty; it was holden to be no good plea in bar, for that a lessee that covenanteth to repair, ought to do it, be his house burnt by negligence, or by any other means. *Style* 162. *Crompton* and *Allen's* case. See at the latter end of this Treatise.

Defendant pleads, the house was burnt, but repaired in convenient time before action brought: The plaintiff demurred, because not shewn by whom, not by the defendant himself: But the court said, That being repaired, though by a stranger, was a good plea; but in truth the plaintiff had repaired it; and because it was a hard case,
the

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the court suffered him to wave his demurrer, and take issue Not repaired in convenient time, the house being uncovered. 2 Keb. 535.

Vide 3 Keb. 40. The like plea and demurrer, because the time not put in certain; *sed non allocatur*, the first of July sufficient.

2dly, Because not said who repaired; and *per cur'*, The house being rebuilt by the plaintiff himself, and the defendant's executors and administrators bound to repair it; the plea is ill, and must shew who repaired it; for if the plaintiff built it, this is no excuse; and judgment for the plaintiff.

If a lessee for years covenanteth to leave wood in as good plight as it was at the time of the lease, and afterwards the trees are overturned by a tempest, he may plead this matter in bar, and it shall discharge him of his covenant, *quia impotentia excusat Legem*. 1 Co. Shelly's case. 40 Ed. 3. 6.

Upon a covenant in an indenture of lease, the breach was for non-payment of rent. Defendant pleaded in bar, that the plaintiff entered into part of the land demised before the rent was due, for which the action was brought, and so had suspended his rent. Plaintiff replied, The defendant did re-enter, and so was possessed as in his former estate. And it was held ill by the court, because the plaintiff did not shew that the defendant continued the possession till the rent grew due, but only that he was possessed in his former right; but the plea in bar was a good plea, and judgment against the plaintiff, *quod nil capiat per Billam*. Style 243. Page and Parr's case.

Vide 3 Keb. 858. In covenant, breach for not repairing. Defendant pleads entry into part and building, &c. Plaintiff demurred.

In

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In covenant against defendants, executors to C. lessee, for rent in arrear in the defendant's time. Defendants plead assignment before rent arrear; plaintiff demurred.—*Per cur'*: The debt may be in the *debet et detinet* on the executors possession, and then such assignment is a good plea. *Contra* on express covenant, where the executor is charged as such; but if charged as assignee only, then the plea were good of assignment before rent arrear; and here judgment must be *de bonis testatoris*, therefore judgment for the plaintiff, *nisi*. 3 *Keb.* 363.

In an action of covenant on demise of a free-stone-quarry to the defendant, the defendant covenants not to dig in any other part of the common, and breach being assigned in digging, defendant pleads *non locavit* the quarry *prædict'*; to which the plaintiff demurs, the demise being by indenture, and the covenant collateral, the plea was held frivolous, and judgment for the plaintiff, *nisi*. 1 *Keb.* 715.

In an action of covenant for not repairing a house, the defendant pleads performance, and after rejoins, that he was ousted by a stranger; which *per curiam*, on demurrer of the plaintiff, is a departure; judgment for the plaintiff, *nisi*. *Idem* 662.

Upon covenant to pay money, *utlary* a good bar. *Idem* 324.

Non infregit conventionem is tried where the house is not repaired. *Idem* 575.

In an action of covenant for rent in arrear on a lease for years, the defendant pleaded a general release of all demands, (which was made by award on collateral differences between them) made after

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after the covenant, and before the rent due; to which the plaintiff demurred, for that the cause of the release was particular and collateral. And judgment for the plaintiff, *nisi*. *Idem*, p. 499, 510, 511. 2 *Cro.* 307, 486. *Mo.* 544, *Et vide Bridgm.* 124, & 20 *Aff.* 5.

See 3 *Keb.* 814. Release of all demands: Demurrer because the release is particular, and bars not for a covenant broken; so after cause of action by battery, release of all demands in personal estate no bar. 3 *Keb.* 418. A covenant broken is not discharged by release to executor of all demands of personal estate of the testator.

In covenant for rent on *nil debet* pleaded, the plaintiff demurred specially; because albeit the covenant doth not alter the rent, yet *nil debet* cannot be pleaded. But the court said it was well enough. 3 *Keb.* 347.

Covenant to enjoy against lawful impediment, is broken by entry of one *habens jus*. 3 *Keb.* 40. So by one *clamans jus*, and not said *legale*. *Idem* 163. Entry *clamans titulum*, not said by a stranger, and since the covenant, no breach. 2 *Keb.* 146.

In covenant on indenture, 8 *Oct.* 1652. of demise to hold for 99 years after the death of Z. K. if three lives so long live; defendant pleads, That the plaintiff *potuit uti* and enjoy the premises without the let of the lessor. To which the plaintiff replies, That the lands are and were duchy lands, and that the king for fine and rent had demised the reversion to H. for 99 years, if the three lives live, by reason whereof he could not enjoy. Defendant demurs, and judgment for the plaintiff:

All this being confessed by the demurrer, the plaintiff needs not shew that he enered, but the defendant should plead it. 3 *Keb.* 162, 202.

Covenant on two deeds of former husband of the defendant's wife, to cut twelve of the best trees, whereby the plaintiff hath election: And breach is assigned, That before the time the defendant cuts down some of the trees. Defendant saith, There were sufficient standing; to which the plaintiff demurred. *Vide* 3 *Keb.* 477.

Covenant no duty, nor cause of action, till broken; and therefore not discharged by release of actions. *Alley's Rep.* 39. *Vide antea.*

Covenant to perform certain indentures, and to save the plaintiff harmless; he cannot plead generally performance of covenants, because some may be in the negative; and also he ought to shew how he saved him harmless. *Alley* 72.

If the lease is not good, there is no covenant nor breach. *Yelv.* 18, 19.

Note, That all covenants between the lessor and lessee are covenants in law, or expresse covenants. *Vaugh. Rep.* 118.

An expresse covenant restrains the general covenants in law. *Idem* 126.

Where the covenant is to enjoy against one or more particular men, and where against all men. *Idem* 127.

By a covenant in law, the lessee is to enjoy his term against the lawful entry or interruption of any man; but not against tortious entries, because the lessee hath his proper remedy against the wrong doers. *Idem* 118, 119.

If a stranger who hath no right outs the lessee,
he

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he shall not bring covenant against the lessor, because he hath remedy by action against the stranger: But if he enter by elder title, then he shall have covenant, because he hath no other remedy. *Idem* 119, 120.

Though the covenant is, That the lessee shall enjoy against all persons; yet he shall not have covenant against the lessor, unless he be legally outed. *Idem* 119, 120, 121, 123.

The law will never adjudge that a man covenants against the wrongful acts of strangers, except the words are full and express. *Idem* 121.

When the covenant is to enjoy against all men, the covenant is not expressly to enjoy against tortious acts, neither shall the law so interpret it. *Idem* 123, 125.

What collateral matters shall be implied upon a covenant. *Vide 1 Ven. Rep. p. 26, 44, 45.*

Though a covenant be made only to a man, his heirs and assigns; yet if the breach be in his lifetime, his executors may bring the action for damages. *Idem* 176.

That a covenant for quiet enjoyment may bind, notwithstanding a subsequent act of parliament to alter the title. *Idem* 175, 176.

In an action of covenant, the defendant cannot plead, That the plaintiff *tempore quo, nihil habuit in tenementis*; though such a plea in an action of debt for rent is good. *2 Vent. Rep. 99.*

Covenant to repair a house; if the lessee come without licence after the term ended to repair the house, he is a trespasser. *2 Roll. 250.*

Note the difference between covenants in gross and covenants grounded upon a lease; covenants

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having a lease for their foundation are within the *proviso* of the statute of 13 *Eliz. cap. 5.* but not in gross. 2 *Roll.* 401.

In an action of covenant to repair, and so to leave the premisses, the breach was in sixty rood, &c.

Defendant pleads, that one barn was pulled down by the plaintiff's consent; and as to the rest, that they were repaired, and so left: To which the plaintiff demurred generally. *Per* chief justice, He should either have taken issue, that he repaired the particulars; or say, that they were not in decay *modo & forma*: And the parties agreed to take issue on one of the points. 2 *Keb.* 798.

C H A P. XI.

Containing Abstracts of Acts of Parliament to prevent Destruction of Houses by Fire, and new Building of Houses within the Bills of Mortality.

BY Stat. 6 Ann. cap. 31. sect. 1. " It shall
" be lawful for the churchwardens of every
" parish within *London* and *Westminster*, and the
" weekly bills of mortality, to fix (at the charge
" of such parish) upon the mains belonging to
" any water-work, so many stop-blocks of wood,
" with a two-inch plug, or so many fire-cocks to
" go into each main, in any place where such
" churchwardens shall direct; the top of such
" stop-blocks to lie even with the pavement; and
" such churchwardens shall have power to fix a
" mark in the front of any houses over against
" the places where such stop-blocks and fire-cocks
" lie, and to keep an instrument in each house
" where the mark is, to open the plug; and each
" parish within the bills of mortality shall keep
" in good order in some publick place, a large
" engine for extinguishing of fires, and shall pro-
" vide one leather pipe and socket of the same
" size as the fire-cock, to convey the water into
" the engine; and the churchwardens making de-
" fault, and being convicted thereof before two
" justices of peace, shall forfeit 10*l.* one moiety to

“ the informer, and the other moiety to the
 “ overseers of the poor of the parish where
 “ such default shall be, for the use of the
 “ poor, to be recovered by warrant from two
 “ justices of peace, by distress and sale of
 “ goods. And the turn-cock belonging to
 “ such water-work, whose water shall be found
 “ on, or first come into, the main where the first
 “ plug shall be opened at any fire, shall be paid
 “ 10*s.* by the churchwardens of such parish where
 “ such fire shall happen; and the first engine-
 “ keeper which brings in a parish engine to ex-
 “ tinguish any fire, if in good order, with a socket,
 “ hose and leather pipe, shall be paid 30*s.* the
 “ keeper of the second parish engine shall be paid
 “ 20*s.* and the third 10*s.* by the churchwardens
 “ of each parish where such fire shall happen;
 “ and in default of payment, such reward shall be
 “ recoverable from the churchwardens by warrant
 “ from two justices of peace, by distress and sale
 “ of goods.”

By *Secl.* 2. “ The watermen belonging to each
 “ insurance office within *London* and *Westminster*,
 “ not exceeding thirty for each office, shall be
 “ free from being impressed, their names and
 “ places of abode being registered with the admi-
 “ ralty office.”

By *Secl.* 3. “ If any servant through negli-
 “ gence shall fire any dwelling-house or out-
 “ house, such servant being thereof convicted by
 “ the oath of one witness before two justices of
 “ peace, shall forfeit 100*l.* unto the churchwar-
 “ dens of such parish where such fire shall hap-
 “ pen, to be distributed amongst the sufferers by
 “ such fire, as to the churchwardens shall seem
 “ just; and in case of refusal to pay, the same
 “ being

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“ being demanded by the churchwardens, such
“ servant shall, by warrant under the hand of two
“ justices of peace, be committed to some work-
“ house or house of correction for eighteen
“ months, to be kept to hard labour.”

By *Secl.* 4. “ Every house that shall be built
“ within the bills of mortality, shall have party-
“ walls between house and house wholly of brick
“ or stone, and of two bricks thick in the cellar
“ and ground-stories, and thirteen inches thick
“ upwards from the foundation quite through
“ each house, and eighteen inches above the roof;
“ and no mundillion or cornish of timber under
“ the eaves shall be suffered in any new house,
“ but all front and rear walls shall be built of
“ brick or stone, to be carried two foot and an
“ half high above the garret-floor, and coped with
“ stone or brick; and if any new houses shall
“ be built within the places aforesaid contrary
“ to this act, the owner of every such house and
“ head builder and workmen shall each of them
“ forfeit 50*l.* one moiety to the informer, and the
“ other moiety to the poor of the parish; to be
“ levied by warrant under the hands and seals of
“ two justices of peace where such building shall
“ be erected, or where such workmen shall inha-
“ bit, by distress and sale of goods, upon convic-
“ tion upon oath, or upon the view of one justice
“ of peace; and for want of distress, the offender
“ shall be imprisoned by warrant from the jus-
“ tices, until payment; the share of such for-
“ feitures appointed to go to the poor to be paid
“ into the hands of the churchwardens.”

By *Secl.* 5. “ Upon the breaking out of any
“ fire within *London* and *Westminster*, all con-

“ stables and beadles shall repair to the place
 “ with their staves and badges of authority, and
 “ be assisting, as well in the extinguishing the
 “ fires, and causing people to work at the en-
 “ gines, as in preventing goods being stolen;
 “ and shall apprehend all persons that they shall
 “ find stealing from the inhabitants; and shall
 “ give their utmost assistance to help the inha-
 “ bitants to remove their goods.”

By *Seet. 6.* “ No action shall be maintained
 “ against any person in whose house any fire shall
 “ accidentally begin, for any damage occasioned
 “ thereby. And if any action be brought for
 “ any thing done in pursuance of this act, the
 “ defendant may plead the general issue; and in
 “ case the plaintiff become nonsuit, &c. the de-
 “ fendant shall recover treble costs.”

By *Seet. 7.* “ Nothing in this act shall defeat
 “ any contract between landlord and tenant.”

By *Seet. 8.* “ So much of this act, as relates to
 “ the indemnity of any person in whose house any
 “ fire shall accidentally begin, shall continue
 “ three years.

Made perpetual, 10 *Ann. c. 14. sect. 1.*

By *Stat. 7 Ann. c. 17. sect. 1.* “ Parishes uni-
 “ ted were intended in the act 6 *Ann. c. 31.* to be
 “ taken as one parish only.”

By *Seet. 2.* “ Where the rewards given to
 “ turn-cocks and engine-keepers are claimed by
 “ reason of any fire happening within *London*, the
 “ churchwardens shall not pay the rewards with-
 “ out the direction of the alderman of the ward,
 “ or his deputy, or two of the common council-
 “ men; and the said rewards shall likewise be
 “ paid to the keeper of any other large engine
 “ (though

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“ (though not a parish-engine) who shall bring
“ in such engine to any fire, in good order.”

By *Sect. 3.* “ In case the vestries of any of the
“ parishes within the bills of mortality shall con-
“ ceive it necessary to have more than one great
“ engine or hand engine, it shall be lawful for
“ them to provide more.”

By *Sect. 4.* “ There shall be left at the house,
“ upon which there is a notice of a fire-plug, a
“ key to open the stop-cock, and a pipe for the
“ water.”

By *Sect. 5.* “ The churchwardens, overseers
“ of the poor and inhabitants, in vestry, of the
“ several parishes within the limits aforesaid, in
“ like manner as they may do for relief of the
“ poor, which rates being confirmed in like man-
“ ner as the rates for the poor, shall be collected
“ in the same manner.”

By *Sect. 6.* “ Where any stop-blocks of wood
“ with plugs, or any fire-cocks, shall be fixed
“ upon mains, and the owners of the water-
“ works shall alter the mains, the owners of the
“ mains shall fix the like stop-blocks, plugs and
“ fire-cocks, upon such new main, where the
“ churchwardens shall direct; and the key and
“ pipe shall be removed to the house upon which
“ notice shall be of such fire-plug.”

By *Sect. 7.* “ The clause 6 *Ann. c. 31. sect. 4.*
“ shall not extend to houses built upon *London-*
“ *bridge*, but the same may be built with timber
“ as hath been used.”

By *Sect. 8.* “ All houses that shall be built
“ within the bills of mortality (except houses on
“ *London-bridge*, and on the river *Thames* below
“ bridge) shall have party-walls between house

“and house, wholly of brick or stone (except
 “door-cases, windows, lentils, breast-summers,
 “story-posts and plates) of two bricks thick in
 “the cellar, and one brick and an half thick up-
 “wards to the top of the garret-floor, and all
 “gable ends to be one brick in length and eigh-
 “teen inches above the roof, and to have no
 “beams or rafters in the brick works of the gable
 “ends.”

By Sect. 9. “All party walls shall be built nine
 “inches on each man’s ground, and the first
 “builders shall have power to pull down the
 “same, and build up the new party-wall, and be
 “paid by the owner of the next house after the
 “rate of five pounds *per rod* as soon as he shall
 “have built; and for all houses that will not
 “yield the rent of 20*l. per Annum* more than the
 “ground-rent, to be left to the discretion of the
 “builders; provided that all party-walls be built
 “with brick.”

By Sect. 10. “All chimney-jambs and backs
 “shall be nine inches thick from the cellars to
 “the roof, and all within the inside of such chim-
 “nies shall be four inches and an half in breadth,
 “and the funnels plaistered or pargeted the inside
 “from the bottom to the top, and all chimnies
 “shall be arched under the hearths with brick
 “(except upon a ground-floor), and no timber
 “shall be nearer than five inches to any funnel
 “or fire place, and all mantles between the jambs
 “arched over with brick, and no wood shall be
 “affixed to the front of any jamb or mantle nearer
 “than five inches from the inside, and all gable-
 “ends called nine inches thick in party-walls
 “shall be rendered on the roughest side; and all
 “stoves

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“ stoves and boilers, coppers and ovens, set up
“ with brick or stone, shall not be nearer than
“ nine inches to the adjoining house, and no
“ timber to lie nearer than five inches to any fire-
“ place or flew.”

By *Seet. 11.* “ It shall not be lawful to distil
“ or boil any turpentine, nor draw any oil of tur-
“ pentine and rosin, by distilling of common tur-
“ pentine, nor boil the said oil and turpentine to-
“ gether above the quantity of ten gallons at one
“ time, in *London, Westminster* and *Southwark*, in
“ any work-house contiguous to any other build-
“ ing, but it shall stand distant from any other
“ building at least fifty foot; except such houses
“ as are already built in *Southwark* and used for
“ the said trade, and except the still and furnace
“ built at *Holborn-bridge* for the distillation of oil
“ of turpentine; upon pain that every person of-
“ fending shall forfeit 100*l.* which may be re-
“ covered with treble costs, by action, &c. in her
“ majesty’s courts at *Westminster*; one moiety
“ whereof shall be to her majesty, and the other
“ moiety to such as shall inform and sue for the
“ same.”

By *Seet. 12.* “ No brick or stone-work in
“ fronts and party-walls, which shall be erected
“ within *London* and *Westminster*, shall bear upon
“ timber (excepting upon piles and planks where
“ they are necessary for foundations in unsound
“ ground, and excepting houses upon *London-*
“ *bridge* and on the *Thames* below bridge); upon
“ pain, that every person offending shall suffer
“ imprisonment for three months.”

By *Seet. 13.* “ No door-frame or window-frame
“ of wood within *London* and *Westminster* (except
“ houses

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“ houses on *London-bridge* and on the river of
 “ *Thames* below bridge) shall be set nearer to the
 “ outside-face of the wall than four inches.”

By Stat. 11 Geo. c. 28. sect. 1. “ All persons
 “ who shall build a house within the bills of mor-
 “ tality, or within the parishes of *St. Mary-le-bone*
 “ and *Paddington*, *Chelsea* and *St. Pancras* in *Mid-*
 “ *dlesex* (except houses on *London-bridge*, or on
 “ the river of *Thames* below bridge), who shall
 “ think it necessary to pull down any partition-
 “ wall, shall (if the owner of such house will
 “ not, or through disability cannot agree)
 “ give three months notice in writing to such
 “ owner or occupier, to whom any part of the
 “ said wall belongs, of his intention to pull down
 “ such party-wall, that it may, within one month
 “ after such notice, be viewed by four workmen,
 “ two to be named by the first builder, and the
 “ other two by the owner or occupier of the next
 “ house; and if either of the parties shall not in
 “ three weeks (after such notice) name such
 “ workmen, then the other of the parties shall
 “ name four workmen, who shall view the party-
 “ wall, and (without consent) the same shall not
 “ be pulled down, unless the majority of the
 “ workmen shall certify under their hands, to the
 “ justices of peace in their next quarter-sessions,
 “ that it is defective and ruinous, and ought to be
 “ pulled down; and if any person think himself
 “ aggrieved by such certificate, the justices shall
 “ upon complaint, summon before them such work-
 “ men, and such other persons as they shall think
 “ fit, and shall examine the matter upon oath,
 “ and make such order in the premises as they
 “ shall think just, and the determinations of the
 “ justices shall be conclusive.

By

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By *Sec. 2.* “ If within three days after such
“ certificate made by the workmen, a copy there-
“ of be delivered to the owner or occupier of such
“ next house, and there be no appeal, if such
“ owner or occupier shall neglect to shore his
“ house within six days after the time allowed for
“ appeal, it shall be lawful for the first builder,
“ giving notice, to enter into such house (at
“ seasonable times) with workmen and materials
“ to shore the same, at the charge of such owner
“ or occupier, and afterwards it shall be lawful
“ for the first builder to build up a new party-
“ wall; and within ten days after such party-
“ wall shall be built, such first builder shall, in
“ writing, leave at such next house, or with the
“ owner or occupier thereof, a true account of
“ the number of rods in such party-wall; and
“ one half of the expence thereof, after the rate
“ of 5*l.* *per* rod, shall be paid by the owner or
“ occupier of such house, who are intitled to the
“ improved rent thereof; and it shall be lawful
“ for such tenant or occupier to pay the first
“ builder for the same, as also for the shoring the
“ house, after he shall have built such party-wall,
“ and to deduct the same out of the first rent that
“ shall be due from him; and in case of neglect
“ to pay within twenty-one days after demand,
“ it shall be lawful for the first builder, to sue
“ such owner for his proportion of the ex-
“ pences of building and shoring, in any court at
“ *Westminster.*”

By *Sec. 3.* “ It shall not be lawful to make in
“ any party-wall within the limits aforesaid, any
“ door-case, window, lenth, breast-summer, or
“ story-posts or plates, unless where two houses
“ shall

“ shall be laid together and used as one house,
 “ during the time of such usage; upon pain that
 “ the owner of such house shall forfeit 50*l*. But
 “ such door-case, &c. may be put in the front
 “ of such house for the conveniency of a shop.”

By *Seet. 4.* “ The first builder, giving three
 “ months notice to the owner or occupier, shall
 “ have power to pull down the two old timber-
 “ walls and partitions, which several houses
 “ within the limits aforesaid have instead of party-
 “ walls, and build a new brick party-wall, and
 “ shall be paid for such party-wall as before
 “ directed.”

By *Seet. 5.* “ The water falling from the tops
 “ of the houses to be built after the 24th of *June*
 “ 1725. within the limits aforesaid, and the water
 “ falling from the balconies and pent-houses,
 “ shall be conveyed by party-pipes on the sides
 “ of fronts of the houses, on pain that the owner
 “ offending shall forfeit 10*l*.

By *Seet. 6.* “ All penalties imposed by this act
 “ shall be sued for as before-mentioned; and one
 “ half thereof shall be to the informer, the other
 “ half to the poor of the parish.”

“ By *Seet. 7.* “ It shall not be lawful for any
 “ second builder to make use of any party-wall of
 “ a house standing singly, and fence-wall, or to
 “ lay any timber, or cut any hole in such party-
 “ walls, on penalty of 10*l*.

By *Seet. 9.* “ The conviction for the said for-
 “ feiture shall be before two justices at least.”

By *Stat. 33 Geo. 2. c. 30. seet. 23.* “ So much
 “ of 11 *Geo. 1. c. 28.* as relates to party-walls with-
 “ in the city of *London* or liberties, shall extend
 “ to all cases within the said city or liberties
 “ where

“ where it is necessary to pull down and re-
 “ build any party-wall, whether either of the ad-
 “ joining houses shall or shall not be, or required
 “ to be rebuilt; and in case the major part of the
 “ workmen appointed to view the party-wall in-
 “ tended to be pulled down, shall not within one
 “ month after such appointment, sign a certificate
 “ in writing as by the said act is required, then
 “ it shall be lawful for the court of mayor and
 “ aldermen, upon application by the owner or oc-
 “ cupier of either of the houses between which
 “ the party-wall shall be, to name one other able
 “ workman to be added to the workmen appointed
 “ by the said act; and the workmen so appointed
 “ in pursuance of the said act and of this act, or
 “ the major part of them, who shall meet (notice
 “ having been given to all of such meeting) shall
 “ view the party-wall; and in case the major
 “ part of such workmen shall certify under their
 “ hands, that such party-wall ought to be pulled
 “ down, then it shall be lawful for the owner or
 “ occupier of either of the adjoining houses to
 “ cause such party-wall to be pulled down and
 “ rebuilt, and he shall have such remedy for re-
 “ covering a moiety of the expences, as by
 “ the said act is provided; subject to such
 “ appeal and determination by the justices of
 “ peace of the said city, as by the same act is
 “ directed.”

By Sect. 24. “ All party-walls which, after
 “ the expiration of three calendar months after
 “ the passing of this act, shall be built within the
 “ said city or liberties, shall be two bricks and an
 “ half thick at least in the cellar, and two bricks
 “ thick upwards to the top of the garret-floor;
 “ and

“ and shall be built of stone or bricks; and no
 “ timbers, except the timbers of the roof, girder,
 “ and the templets under the same, shall be laid
 “ into the party-walls, and the ends of girders
 “ lying within such party-walls shall not exceed
 “ one foot; and none of the ends of the girders in
 “ adjoining houses shall meet, or be laid opposite
 “ to each other; and the sides thereof shall be at
 “ least nine inches distant from each other: And
 “ if any builder shall build any party-wall within
 “ the said city or liberties contrary to this act, or
 “ shall use in the building thereof any bricks other
 “ than good well burnt bricks, or shall lay any
 “ timber in any party-wall contrary to this act, he
 “ shall for every such offence forfeit 50*l.* one
 “ moiety to the informer, and the other moiety
 “ to the poor of the parish where such building
 “ shall be; to be levied by warrant of two jus-
 “ tices of peace by distress and sale of the offen-
 “ der’s goods, upon conviction upon oath of one
 “ witness or confession; and for want of distress
 “ the offender shall be imprisoned for six months,
 “ unless the penalty be sooner paid, by war-
 “ rant of the said two justices.”

By *Seet.* 25. “ When any house within the
 “ said city or liberties in part built over ground
 “ being the property of some other person, or
 “ whereof the several floors or parts are the pro-
 “ perty of different persons, shall be so decayed
 “ as to make the owner of the ground, or of any
 “ part of the house, desirous to rebuild the same,
 “ and the owners or occupiers of such house or
 “ of any parts shall not be able or willing to join,
 “ or by any legal disability cannot join, then it
 “ shall be lawful for the court of mayor and al-
 “ dermen, upon application by the party desiring
 “ to

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“ to rebuild, to issue their order to the sheriffs of
“ *London*, to summon a jury before the said court
“ at such time as the said court shall appoint, to
“ try whether the premisses ought to be rebuilt
“ or not, and to cause notice thereof to be given
“ to or left at such premisses for such owners or
“ occupiers; and if such jury shall be of opinion
“ that the premisses ought to be rebuilt, and any
“ of the owners or occupiers, or some person on
“ their behalf, shall not in court declare their con-
“ sent to join in the expence of rebuilding, then
“ such jury shall be again impanelled and sworn
“ to enquire the value of the parts belonging to
“ the persons refusing, or legally disabled; and,
“ upon payment or tender of the value awarded
“ by such jury to the parties interested, if they
“ can be found within the said city or liberties,
“ or upon payment into the bank in the name of
“ the chamberlain of the said city, for the use of
“ the persons intitled thereto, in case they cannot
“ be found within the said city or liberties, the
“ estate of the parties so refusing, or disabled in
“ the premisses, shall vest in the persons obtaining
“ such award; and they may pull down and re-
“ build the said house, and shall from thenceforth
“ hold the same for ever.”

By *Stat. 26.* “ Where any party-wall with-
“ in the said city or liberties shall, by 11 *Geo. c.*
“ 28. and this act, be pulled down and rebuilt
“ by the owner or occupier of one of the ad-
“ joining houses, the expence of such party-wall
“ shall be estimated at the rate of 7 *l. per rod.*”

By *Stat. 27.* “ Where any party-wall shall be
“ built agreeable to this act, in execution of any
“ contract entered into before 1 *March 1760*, the
“ ex-

“ expence of such party-wall shall be estimated at
 “ 7*l.* per rod, notwithstanding such contract.”

By Stat. 4 Geo. 3. c. 14. sect. 1. “ That so
 “ much of the act of 11 Geo. 2. c. 28. as relates
 “ to party-walls within the city and liberty of
 “ *Westminster*, or any parish or place comprised
 “ within the weekly bills of mortality, or within
 “ the parishes of *St. Mary-le-bone* and *Paddington*,
 “ or the parishes of *Chelsea* and *St. Pancras*, (ex-
 “ cept the city of *London*, and the liberties there-
 “ of; and also, the party-walls of houses on the
 “ river of *Thames* below bridge) shall extend to
 “ all cases whatsoever within the said city and
 “ liberty of *Westminster*, and the several parishes,
 “ precincts, and limits aforesaid, where it is or
 “ shall be necessary to pull down and rebuild any
 “ party-wall, whether either of the adjoining
 “ houses shall or shall not be, or require to be
 “ rebuilt, or new built.”

By Sect. 2. “ If from and after the passing of
 “ this act, the major part of the workmen ap-
 “ pointed, in manner by the recited act prescribed,
 “ to view the party-wall of any house within the
 “ city of *Westminster*, and the several parishes,
 “ precincts, and limits aforesaid, intended to be
 “ pulled down, shall not, within one calendar
 “ month next after such appointment, sign a cer-
 “ tificate, as by the said act is required; in such
 “ case, any two justices for the city or county,
 “ residing within or near the parish, &c. are au-
 “ thorized and required, upon application made
 “ by the owner or occupier of either of the houses,
 “ between which the party-wall proposed to be
 “ pulled down shall be, to name and appoint one
 “ other able workman, to be added to those ap-
 “ pointed in pursuance of the recited act; and
 “ they

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“ they, or the major part of them, who shall meet
“ for that purpose (ten days notice of such in-
“ tended meeting having been given to, or left
“ at the dwelling house of, each of them) shall
“ view the party-wall proposed to be pulled down;
“ and in case the major part of them shall certify,
“ under their hands, that such party-wall is de-
“ fective and bad, and ought to be pulled down,
“ the owner or occupier of either of the adjoining
“ houses, may cause the same to be pulled down
“ and rebuilt; and shall have such remedy for re-
“ covering a moiety of the expences, as by Stat.
“ 11 Geo. 2. c. 28. is provided; subject never-
“ theless to such appeal to, and determination by,
“ the justices of the peace, as by the same act is
“ directed.

By Sect. 3. “ And as it would tend greatly to
“ prevent the fatal consequences of fire spreading
“ and communicating to adjoining houses, if
“ party-walls were to be made of greater thick-
“ ness than is prescribed by the act of 7 Anne,
“ *For making more effectual an act made in the sixth*
“ *year of her said majesty's reign, for the better pre-*
“ *venting of mischiefs that may happen by fire*; and
“ if no timbers, except the timbers of the girders,
“ binding joists, and the templets under the same,
“ were laid into the party-walls; and if no tim-
“ bers of the roof be laid into such party-walls
“ (except the purloins or kerb thereof); and if the
“ ends of the girders or binding joists, lying
“ within the party-walls, did not exceed one foot;
“ and if none of the ends of the girders or bind-
“ ing joists, in adjoining houses, met, or were
“ laid opposite to each other, and the sides where-
“ of were laid at least fourteen inches distant from
“ each other; and if there should be nine inches,
“ at

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“ at least, of solid brick-work left at or between
 “ the ends of all lentils, wall-plates, and bond-
 “ timbers, laid in or upon the walls of the fore
 “ and back fronts of all houses which shall ad-
 “ join to each other ; it is enacted, That all party-
 “ walls which, from and after the expiration of
 “ three calendar months next after the passing of
 “ this act, shall be erected within the city or liber-
 “ ty of *Westminster*, and the parishes, precincts, and
 “ limits aforesaid, shall be two bricks and an half
 “ thick at the least in the cellar, and two bricks
 “ thick upwards to the garret-floor ; and from
 “ thence one brick and an half thick at least
 “ eighteen inches above the roof or gutters which
 “ adjoin to such party-walls ; and that the same
 “ shall be built of stone, or of good sound burnt
 “ bricks, and none other.”

By *Sect. 4.* “ And no timbers, except the tim-
 “ bers of the girders, binding joists, and the temp-
 “ lets under the same, shall be laid into the party-
 “ walls ; and no timbers, of the roof shall be laid
 “ into such party-walls (except the purloins or kerb
 “ thereof) and the ends of girders, and binding
 “ joists, lying within such party-walls, shall not
 “ exceed nine inches, and none of the ends of the
 “ girders, or binding joists, in adjoining houses,
 “ shall meet or be laid opposite to each other ;
 “ and the sides thereof shall be at least fourteen
 “ inches distant from each other ; and there shall
 “ be nine inches, at least, of solid brick work
 “ left at or between the ends of lentils, wall-
 “ plates, and bond-timbers laid in or upon the
 “ walls of the fore and back fronts of all houses
 “ which adjoin to each other : And if any head
 “ builder, master bricklayer, or workman, shall
 “ build, or cause to be built, any party-wall con-
 “ trary

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“ trary to the directions, true intent and mean-
“ ing of this act; or shall use, in the building
“ thereof, any bricks, other than good sound
“ burnt bricks; or shall lay any timber in any
“ party-wall, contrary to the direction, true in-
“ tent and meaning of this act, he shall forfeit
“ for every such offence 50*l.* to be equally
“ divided between the informer, and the poor of
“ the parish where such building shall be; to be
“ levied by warrant of two justices by distress
“ and sale, upon conviction upon oath of one
“ credible witness, or upon confession of the
“ party, rendering the overplus; and for want
“ of distress, the offender shall be imprisoned for
“ six months, unless the penalty be sooner paid;
“ or the aforesaid penalties may be sued for by
“ action of debt, &c. in any of the courts of re-
“ cord at *Westminster*; and the prosecutor re-
“ covering shall be intitled to double costs of
“ suit, over and above the penalty; and one
“ moiety of the penalty, when recovered, shall
“ be immediately paid, by the person recovering
“ the same, to the churchwardens or overseers,
“ &c. for the use of the poor of the parish, and
“ the other moiety shall be for the use of the
“ prosecutor.”

By *Stat.* 5. “ From and after 1 *July* 1764, no
“ timber whatsoever shall be laid under the hearth
“ of any room, or within nine inches of the fun-
“ nel or flew of any chimney; and no timber
“ buildings shall be built adjoining to any house,
“ so as the timbers thereof shall be laid into the
“ wall of any house already built, or hereafter
“ to be built, under the penalty of 50*l.* to be
“ recovered, levied, and applied, against the
“ work-

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“ workman, or person causing such building to
 “ be erected, in like manner as any other penalty
 “ or forfeiture by this act.”

By *Sect. 6.* “ After any party-wall shall be
 “ erected pursuant to the directions of this act,
 “ no person who shall build against such party-
 “ wall, shall cut into or wound the same, for the
 “ conveniency of making a chimney, or for any
 “ other purpose; nor shall lay into the same any
 “ other timbers than are allowed by this act to be
 “ laid into new party-walls, under penalty of
 “ 50*l.* to be recovered against the party offend-
 “ ing, in the manner before directed.”

By *Sect. 7.* “ Every master builder who shall,
 “ after 1 *July* 1764, build any house within the
 “ limits above-mentioned, shall, within fourteen
 “ days after the same shall be covered in, cause
 “ the same to be surveyed by one or more sur-
 “ veyors; who shall make oath, before one of the
 “ justices for *Middlesex* or *W Westminster*, that the
 “ same hath been (to the best of his judgment
 “ and belief) built agreeable to the several direc-
 “ tions in this act contained; which affidavit shall
 “ be filed with the clerk of the peace for the
 “ county of *Middlesex*, within ten days after
 “ the making thereof; and the clerk of the
 “ peace, for his trouble therein, shall receive one
 “ shilling and no more: And if any master builder
 “ shall neglect to cause such survey to be made,
 “ or such affidavit to be made and filed as afore-
 “ said, he shall, for every such neglect or default,
 “ forfeit 50*l.* to be recovered and applied as any
 “ penalties or forfeitures by this act are directed.”

By *Sect. 8.* “ The parishioners and inhabitants,
 “ where any offence against this act shall be com-
 “ mitted

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“mitted (except persons receiving alms) shall
“be admitted competent witnesses, notwithstanding
“their being parishioners, or inhabitants.”

By Sect. 9. “Where any dispute hath arisen,
“or shall arise, between the owners of any house
“already pulled down in order to be rebuilt, and
“the owners of any house adjoining, concerning
“any part or parts thereof, intermixed over or
“under each other, in such manner that a party-
“wall of brick or stone cannot be effectually
“built upon the old foundations, perpendicular
“quite through all the stories of the said house,
“in order to prevent mischiefs by fire, without
“pulling down some part or parts of one or more
“of the said adjoining houses, and laying some
“part or parts thereof, or ground to the other;
“in all such cases the justices in their general or
“quarter-sessions for the city and liberty of *West-*
“*minster*, or the county of *Middlesex*, are au-
“thorized and required, upon application of the
“person desirous to pull down or rebuild any
“house as aforesaid, to examine into such dis-
“putes, and ascertain the property, and fix the
“value, of what may be found necessary to
“be wanted for erecting perpendicular party-
“walls upon the old foundations as aforesaid;
“and, for that purpose, to issue their order to the
“sheriffs or bailiffs, or other proper officer, to
“summon a jury to view the premises, try the
“facts, and fix the value of any damages that
“may arise, on their verdict; and, upon such
“verdict, the justices shall make such order in
“the premises as they shall think just and rea-
“sonable; and their determinations shall be final
“and conclusive, without any appeal.”

By

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By Sect. 10. " That the respective governors
 " or directors of the several insurance offices,
 " within the cities of *London* and *Westminster*; for
 " insuring houses and other buildings against
 " losses by fire, may and shall, upon the applica-
 " tion and request of any person interested in, or
 " intitled unto, any house or other buildings,
 " within the limits by this act prescribed, which
 " hereafter shall be burnt down, or damnified by
 " fire; or upon any grounds of suspicion that the
 " owner, occupier, or other person who shall have
 " insured the same, have been guilty of fraud,
 " or of wilfully setting their house, &c. on fire;
 " cause the insurance money to be laid out as far
 " as the same will go, towards rebuilding, or re-
 " pairing such house or other building; unless
 " the party claiming the insurance money shall,
 " within sixty days after such claim shall be ad-
 " justed, give sufficient security to the insurance-
 " office, that the money shall be laid out and ex-
 " pended as aforesaid; or unless the said in-
 " surance money shall be in that time settled and
 " disposed of amongst all the contending parties,
 " to the satisfaction and approbation of the go-
 " vernors or directors of such insurance-offices."

By Sect. 11. " No order of any justice under
 " this act, or other proceedings touching the con-
 " viction of any offender, shall be quashed or va-
 " cated for want of form only, or be removed by
 " *certiorari*, or any other writ, into any of the
 " courts of record at *Westminster*."

By Sect. 12. " If any process or suit shall be
 " brought against any person, for any thing done
 " in pursuance of this act, the same shall be laid
 " or brought within six months after the fact
 " done,

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“ done, and in the county or place where the
“ fact was committed, and not elsewhere; and
“ the defendant may plead the general issue, and
“ give this act and the special matter in evidence,
“ at the trial, and that the same was done in pur-
“ suance and by authority thereof: And if it
“ shall appear to have been so done, or if any
“ action or suit shall not be brought within the
“ time limited, or shall be brought in any other
“ county or place than as aforesaid, the jury shall
“ find for the defendant; or if the plaintiff shall
“ become nonsuited, or suffer a discontinuance of
“ his action; or a verdict or judgment upon de-
“ murrer be given against the plaintiff, the defen-
“ dant shall have treble costs, and such remedy
“ for the same, as defendants have for costs in
“ other cases by law.”

By *Sect. 13.* “ In all cases where any party-
“ wall within the limits aforesaid, shall by virtue
“ of the act of 11 Geo. 2. c. 28. and of this act,
“ be pulled down and rebuilt, agreeable to the
“ directions of this act, by the owner or occupier
“ of one of the adjoining houses, the expence
“ thereof shall be estimated after the rate of 6 l.
“ 10 s. *per rod.*”

By *Sect. 14.* “ Where any party-wall shall be
“ built, agreeable to the directions of this act, in
“ execution of any contract entered into with the
“ builder before 1 July 1764, the expence of such
“ party-wall shall be estimated after the rate of
“ 6 l. 10 s. *per rod*; any thing in such contract to
“ the contrary notwithstanding.”

By *Sect. 15.* “ For the better preventing the
“ spreading of fires, all houses or other buildings,
“ which, from and after the expiration of thres

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“ calendar

“ calendar months next after the passing of this
 “ act, shall be erected within the limits aforesaid,
 “ shall be built of stone, or of good sound hard
 “ well burnt bricks, and none other, both in the
 “ fore front and back front thereof, from the
 “ breast-summer upwards (and likewise the party-
 “ walls), and such breast-summer shall not be
 “ higher than the floor of the one pair of stairs.”

By *Seet. 16.* “ In all cases where any of the
 “ rewards shall be claimed by virtue of *Stat.*
 “ *6 Ann. c. 31.* by reason of any fire happening
 “ within the liberties or places aforesaid, such
 “ rewards shall be paid and payable in the same
 “ manner to the keeper of any other large en-
 “ gine (though not a parish engine) who shall
 “ bring such engine in good order and complete,
 “ to help to extinguish such fire, in the same
 “ manner as if such engine was a parish engine.”

By *Seet. 17.* “ This act shall be deemed a
 “ publick act, and be judicially taken notice of as
 “ such by all judges, justices, and other persons,
 “ without specially pleading the same.”

By *Stat. 6 Geo. 3. c. 37. sect. 1.* “ That from
 “ and after the passing of this act, when the
 “ major part of such workmen shall have certified
 “ under their hands, as aforesaid, that the party-
 “ wall of any house within the city and liberty of
 “ *Westminster*, and limits aforesaid, is defective
 “ and bad, and ought to be pulled down; in
 “ every such case, if any owner or occupier of
 “ either of the houses adjoining shall, upon no-
 “ tice given of such certificate, by delivering to
 “ him a copy thereof, or leaving the same at the
 “ place of his abode, refuse admittance to any
 “ builder, or persons employed, to shore up such
 “ houses,

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“ houses, or to pull down such party-walls ;
“ then, upon oath made by such builder, or other
“ persons, of the service of the copy of such cer-
“ tificate, and of such refusal, before a justice,
“ such justice is required, by his warrant, to au-
“ thorize and impower such builder, or other
“ persons, in the presence of a constable or other
“ peace officer, at any time after the end of four-
“ teen days after a true copy of the said warrant
“ shall be left at the house in which such shoring
“ is intended to be, between the hours of eight
“ in the morning and four in the afternoon, to
“ enter the house adjoining to such party-wall,
“ for the purpose of shoring up such house, and
“ pulling down such party-wall ; and, if the
“ outer door of such house shall be shut, and the
“ owner or occupier, &c. shall refuse, upon being
“ demanded; to open the same, to break open such
“ outer door, and remove any goods, or other
“ matter whatsoever, which shall obstruct the
“ execution of the said works ; and from time
“ to time to re-enter the premises, and abide
“ therein the usual times of work, for the shoring
“ up the said house, and taking down such party-
“ wall, and rebuilding the same : And if any
“ such owner or occupier, or other person, shall
“ in any manner obstruct or hinder the execution
“ of the said works ; every such offender shall
“ forfeit 5*l.* to be recovered and levied as the
“ penalties by the act of 4 *Geo.* 3.”

By *Seçt.* 2. “ But no builder, or his workmen,
“ shall make entry by virtue of such warrant
“ from a justice, unless some general or quar-
“ ter-sessions for the county, city, or liberty, hath
“ happened, after such certificate and notice, ten
“ days at the least, before the signing such war-

“rant; nor in case any such certificate shall
 “have been quashed at such general or quarter-
 “sessions.”

By *Sect. 3.* “That from and after the passing
 “of this act, no timbers, except the timbers of the
 “girders, binding joists, and the templets under
 “the same, and necessary bond-timbers, shall be
 “laid into the party-walls erected or built, or to
 “be erected or built according to the directions of
 “the act of 4 Geo. 3. within the city or liberty,
 “and limits aforesaid; and that no timbers of
 “the roof be laid into such party-walls, except
 “the purloins or kerb thereof; and that the ends
 “of girders, and binding joists, lying within
 “such party-walls, shall not exceed nine inches;
 “and that none of the ends of the girders, or
 “binding joists, in adjoining houses, shall meet,
 “or be laid opposite to each other; and that the
 “sides thereof shall be at least nine inches dis-
 “tant from each other; and that there shall be
 “nine inches at least of solid brick-work at or
 “between the ends and sides of all bond-timbers:
 “And if any head builder, master bricklayer, or
 “workman, shall offend contrary to the true in-
 “tent and meaning of this present act, he shall be
 “liable to all the penalties in the said act of
 “4 Geo. 3. to be sued for and recovered as in the
 “said act is declared.”

By *Sect. 4.* “After any house or other build-
 “ing is erected, any person who shall build next
 “adjoining thereto, and make use of the party-
 “wall thereof, for laying in the timbers, or for
 “any other purpose, shall pay to the proprietor
 “one half of the value of such wall, or of so
 “much thereof as he shall make use of according
 “to so much *per rod* as shall be estimated by two
 “in-

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“ indifferent persons, one to be chosen by each
“ party ; and if they differ, then the same to be
“ referred to one indifferent person, to be chosen
“ by such arbitrators ; which value, when so
“ estimated and determined, shall be recoverable
“ in like manner as the price of party-walls is
“ directed to be by the act of 4 Geo. 3.”

By Sect. 5. “ That if any action, suit or in-
“ formation, is now depending in any of the
“ courts at *Westminster*, or before any justices of
“ the peace, against any such first owner, head
“ builder, or workman, for not having built con-
“ formable to the directions of the said act ; the
“ court where the same shall be brought, is au-
“ thorized and required, on the application of the
“ defendants, to make a rule for the plaintiff or
“ informer to set forth the particular defect or
“ irregularity complained of ; and if such de-
“ fendant shall thereupon enter into any agree-
“ ment for making good the same, and rendering
“ the building conformable to the direction of the
“ said act, within a certain time, to be specified
“ in the agreement, and shall be desirous that such
“ agreement should be made a rule of court ; then
“ such agreement shall, upon producing an affi-
“ davit of the execution thereof by the witnesses
“ thereto, or any of them, in the court of which
“ the same is agreed to be made a rule, and read-
“ ing and filing the said affidavit in court, be en-
“ tered of record ; and a rule shall thereupon be
“ made, that the defendant shall, within a cer-
“ tain time, make good the defects and irregu-
“ larities complained of, and render the building
“ conformable to the direction of the said act ;
“ and that such defendants shall moreover pay
“ such costs as the court shall direct and award ;

“ and any justices, before whom any such informations are now depending, are required and impowered, on the application of any first owner, head builder, or workman, against whom such informations shall be laid, to accept and receive such judgment.”

By *Sect. 6.* “ In every such case such court and justices are required and impowered, on such first owner, head builder, or workman, making appear to them, that the defects and irregularities complained of are made good, and the building rendered conformable to the direction of the said act, according to agreement entered into for that purpose, to indemnify and discharge every such defendant from all penalties and forfeitures, incurred by reason of not having originally built such party-walls pursuant to the directions of the said act, or for any other defect or irregularity, whereby such houses are otherwise built than pursuant to such directions.”

By *Sect. 7.* “ Nothing in this act shall extend to indemnify any person against whom final judgment shall have been given in any action, &c. in any court of record, for any penalty incurred by having neglected to make such party-walls, or, in any other respect, to build such houses pursuant to the directions of the said act of 4 *Geo. 3.*”

By *Sect. 8.* “ If any head builder or master bricklayer shall, from and after 1 *June* 1766, build, or cause to be erected and built, any house within the limits aforesaid, contrary to the directions of the said act, or of this act, he shall not only pay the penalties, whereof he shall be convicted, but also shall, within
fix

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“ six months next after being convicted of such
“ offence, in manner by the said act prescribed,
“ make good all such defects and irregularities,
“ and render the building conformable to the
“ directions of the said act, or of this present
“ act; on penalty of forfeiting the further sum
“ of 50*l.* to be applied as aforesaid; and to be
“ levied and recovered in manner as by the
“ said act is directed, and so *toties quoties*, for
“ every six months that such defects and irregu-
“ larities shall continue, and such house or houses
“ remain built otherwise than conformable to the
“ directions of the said act, or of this act.”

By *Sect.* 9. “ If any workman, or servant to
“ such head builder or master bricklayer, shall
“ negligently or wilfully, and without the direc-
“ tion, privity, or consent, of such head builder
“ or master bricklayer, do any thing toward the
“ building of such house or houses, contrary to
“ the directions of the said act, or of this act, he
“ shall for every such offence forfeit 5*l.* to be
“ paid to the informer; and if not paid imme-
“ diately, upon conviction, before some justice for
“ the county of *Middlesex*, or for the city and
“ liberty of *Westminster*, upon the oath of one
“ credible witness, or upon his own confession,
“ the justice shall commit him to the house of
“ correction for three months, without bail or
“ mainprize, unless the said penalty be sooner
“ paid.”

By *Sect.* 10. “ If any action or suit shall be
“ commenced, or information given to any jus-
“ tice for the county of *Middlesex*, or city or
“ liberty of *Westminster*, against any person for any
“ thing done by any first owner, head builder, or
“ head workman, contray to the true intent and

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“ meaning of the acts of 6 & 7 *Anne*, and 11
“ *Geo.* and 4 *Geo.* 3. or of this act, the same
“ shall be laid or brought within three months
“ after the fact done, and not afterwards.”

By *Sect.* 11. “ If any action or suit shall be
“ commenced against any person for any thing
“ done in pursuance of the act of 4 *Geo.* 3. or of
“ this act, the same shall be laid or brought
“ within six months next after the fact done, and
“ not afterwards; and shall be laid or brought in
“ the county or place where the fact was com-
“ mitted, and not elsewhere; and the defendant
“ may plead the general issue, and give this act,
“ and the special matter in evidence, at the trial;
“ and that the same was done in pursuance
“ and by the authority of this act: And if it
“ shall appear to have been so done, or if any ac-
“ tion or suit shall not be brought within the time
“ limited, or shall be brought in any other coun-
“ ty or place than as aforesaid, the jury shall find
“ for the defendant; or if the plaintiff shall be-
“ come nonsuited, or suffer a discontinuance of
“ his action, or a verdict shall pass against the
“ plaintiff; or if, upon demurrer, judgment shall
“ be given against him, the defendant shall have
“ treble costs, and such remedy for the same, as
“ any defendant hath for costs in any other cases
“ by law.”

By *Sect.* 12. “ This act shall be deemed a
“ publick act; and be judicially taken notice of
“ as such, by all judges, justices, and other per-
“ sons, without specially pleading the same.”

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E R R O R S.

Page 122. l. 25. for *outed* read *ousted*.

F I N I S.

